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PRE-CONVENTION ISSUE

TWENTY-EIGHTH ANNUAL CONVENTION
HOTEL DEL CORONADO, CORONADO, CALIFORNIA
July 7, 8, 9, 1955

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1954-1955

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•*Deceased*

PURPOSE

The purpose of this Association shall be to bring into close contact by association and communication lawyers, barristers and solicitors who are residents of the United States of America or of any of its possessions or of any country in the Western Hemisphere, who are actively engaged wholly or partly in the practice of that branch of the law pertaining to the business of insurance in any of its phases or to Insurance Companies; to promote efficiency in that particular branch of the legal profession, and to better protect and promote the interests of Insurance Companies authorized to do business in the United States of America or in any country in the Western Hemisphere; and to encourage cordial intercourse among such lawyers, barristers and solicitors, and between them and Insurance Companies generally.

President's Page

IS THE DEFENSE READY?

THE bailiff has intoned his "Oyez" and his "God save". Routine motions have been disposed of. Yours is the only case for the day, and a big case it is. Plaintiff's counsel is prepared to proceed. The courtroom, a small one by the standards of a generation ago, is crowded. There comes a sudden hush. The judge turns to you and asks, "Is the defense ready?"

You rise to your full height and, confident in mien, proclaim, "The defense is ready!" Inside, however, you are tensed up. Your throat is dry.

Behind you are scores, hundreds, even thousands of man-hours, your own and your helpers', spent in laboriously searching out and enlisting witnesses, piecing together stubborn facts, choosing your defense positions, fortifying your strong points. As your second line of defense you have a battery of books, assigned their proper missions, properly emplaced.

And then, through hard-fought days, you sustain the attack. Limited as your freedom to maneuver is, these days are grimly punishing. At long last you hear, "The plaintiff rests."

Now you must marshal your witness forces, "effect a strategic withdrawal" where you must, counter attack, turn your enemy's flank where you can. All this perhaps through many more arduous days.

Happy are you if the twelve good men and true find you right when you said "The defense is ready."

Forty years or so of such episodes and "This is Your Life". That atavistic or otherwise subjective something which made you a defense trial lawyer predestined you for "great tribulations". If, withal, you have found time to play, to enjoy family and friends, to read great books, "felt dawn, saw sunset's glow, loved and were loved", yours will have been a good life.

* * * * *

You and members of your families, to the number of 806, as of January 6, held reservations for our annual meeting next July at Coronado. As John Kluwin reports elsewhere in this issue, however, others of you will be able to attend by making reservations promptly. Glamorous surroundings and a stimulating program will make it one of our finest. It will be a memorable occasion.

* * * * *

This is my last "President's Page". Writing these pages has been one of the major pleasures of being President of your eminent organization.

STANLEY C. MORRIS
President

INTERNATIONAL ASSOCIATION OF INSURANCE COUNSEL

Office of the President
P. O. Box 1588
Charleston 26, West Virginia

April 11, 1955

Mr. Victor J. Holper
Managing Editor
West Publishing Company
St. Paul 2, Minnesota

Dear Mr. Holper:

For the second time you have been kind enough to supervise your very efficient editorial staff in preparing the text of a cumulative index of Insurance Counsel Journal. This index unlocks to our membership, to courts and to the libraries receiving the Journal the extensive storehouse of thoroughly usable material to be found in the pages of the Journal. This material embodies the results of countless thousands of man-hours of painstaking study on the part of the able membership of our Association. The indexing has been splendidly done.

By this generous action on your part you have rendered a great service to our Association and to the legal profession. You deserve and have our sincere thanks.

Very truly yours,

Stanley C. Morris

President

SCM/ms

Insurance Counsel Journal

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Current Decisions

GEORGE W. YANCEY, EDITOR
Birmingham, Alabama

COLE VS. RUSH, 42 A.C. 895

THIS is an appeal from a judgment of the Superior Court of Los Angeles County, reversed. This was a wrongful death action wherein plaintiffs, who are the surviving widow and minor children of James Bernard Cole, deceased, sought to recover damages for the alleged negligent furnishing of intoxicating liquor to the deceased which plaintiffs claim proximately caused his death.

Material allegations of the complaint indicate that defendants own and operate an establishment known as Tropic Isle wherein they sell intoxicating liquors to the public for consumption on the premises. The deceased was a frequent patron of the Tropic Isle and the defendants had on occasion sold him alcoholic beverages which he consumed on the premises. It was alleged that Cole was not intoxicated on October 13, 1950, when he entered the Tropic Isle but that the defendants sold him substantial quantities of intoxicating liquor making him quite intoxicated. It was further alleged that the defendants knew that the deceased was normally of quiet demeanor but that when intoxicated he became belligerent, pugnacious and quarrelsome; further, that on numerous prior occasions plaintiff's widow had requested defendants not to furnish or sell intoxicating liquors or beverages to Cole sufficient to allow him to become intoxicated, but defendants refused to comply with such requests; further, that Cole's intoxication on the day involved was the proximate result of the beverages sold to him and that Cole became belligerent, pugnacious and quarrelsome and engaged in a fist fight with one Leonard, who struck Cole causing him to strike his head on the pavement which resulted in his death.

It is to be noted that California has no dram shop or civil damage act.

The majority opinion in this case was written by Justice Carter who reversed the decision of the lower court which had sustained a demurrer to the complaint without leave to amend. Carter recognized the general basic rule that the sale and consumption of intoxicating liquor is not the proximate cause of injuries subsequently received by the purchaser because of his intoxication. The opinion distinguishes the cases announcing the general rule upon the ground that the deceased met his death in fact as a proximate result of his intoxication and that defendants had notice of the probable consequences of selling him beverages. The court further indicated that the action herein was brought by the surviving spouse and the dependent children for loss of consortium and support, and was not an action brought by the deceased himself for injuries sustained as a result of his intoxication.

There was a strong dissent in this case by Justice Schauer upon the broad basic principle that it is not within the province of the court to undertake to create a cause of action for plaintiffs where none exists, either by statute or by common law where such is a clear invasion of the powers and function of the legislature. The dissent was concurred in by Justices Traynor and Edmonds.

(This is a four to three decision, the Supreme Court of this state granting a petition for rehearing on July 1. If this decision is affirmed, in substance it will create a liability on the part of all dram shop proprietors as though the legislature had created a dram shop act. The majority opinion proceeds upon deviations in the common law and thus this type of a result could be obtainable in most any jurisdiction in the United States, if the courts of these states followed the same pattern of thinking.)

(Contributed by Frank Creede, San Francisco, California).

In re: *KESLER v. PABST*—

IMPUTATION OF HUSBAND'S NEGLIGENCE TO WIFE

In its long awaited decision in the case of *Kesler v. Pabst,* the California Supreme Court has held that a husband cannot avoid the imputation of contributory negligence from himself to his wife where he makes a post-accident relinquishment of his interest in the community property to her.

In this state it has long been the rule that a wife's cause of action for injuries is by nature a community cause of action and that any recovery by her becomes com-

munity property. Accordingly, in a typical accident where the driver-husband is negligent, it has been held that his negligence must be imputed to his wife lest he be unjustly enriched in that the recovery by the wife would become partly his as community property. Plaintiffs' counsel have sought to avoid the impact of this rule in various ways including the device of a formal written relinquishment of interest in the recovery by the husband after the cause of action has arisen. The Supreme Court's decision nullifies this device on the ground that to sanction it would allow the negligent spouse to avoid the consequences of his own wrong. It therefore remains the rule in this state that the husband's contributory negligence will be imputed to the wife in cases of this type.

The opinion is written by Justice Traynor and there is a dissent by Justice Carter who contends that a cause of action in the wife for her personal injuries is not a community cause of action.

(Contributed by Frank Creede, of San Francisco, California).

PRINCIPAL AND SURETY—LIABILITY OF SURETY ON CONTRACTOR'S PAYMENT BOND FOR WITHHOLDING AND F. I. C. A. TAXES

The Court of Appeals for the Fourth Circuit has joined the Courts of Appeal for the Tenth, Ninth and Fifth Circuits in denying the United States Government recovery on a contractor's bond for withholding and Federal Insurance Contributions Act taxes, deducted by the contractor from its employees' wages. *United States v. Crosland Construction Company, Inc., et al.*, 217 F. 2d 275 (C.A. 4) (Decided December 1, 1954).

In that case the contractor had contracted with Newberry County Memorial Hospital to construct alterations and additions to the hospital. The contractor procured a payment and performance bond pursuant to the contract. The payment bond provided that "the principal shall promptly make payment to all persons supplying labor and material in the prosecution of the work". The work was completed and the employees paid. The contractor withheld withholding taxes and F. I. C. A. Taxes from its employees' wages but failed to pay the taxes to the Government.

The Government contended that the sums withheld from the wages of the contractor's employees for withholding and F. I. C. A. taxes were in fact wages and not taxes and accordingly the sureties were liable, under the payment bond, to the Government for the sums withheld by the contractor-employer.

The District Court granted the sureties' motion to dismiss the complaint as not stating a claim upon which relief could be granted. *United States v. Crosland Construction Co., Inc., et al*, 120 F. Supp. 792.

In affirming the District Court, the Court of Appeals for the Fourth Circuit adopted the majority view of the Tenth Circuit Court of Appeals, expressed in the case of *United States Fidelity & Guaranty Co. v. U. S.*, 201 F 2d 118, as follows:

> "* * * that when an employer withholds the tax from an employee's wage, and pays him the balance, the employee has been paid in full. He has received his full wage. Part of it has gone to pay his withholding tax and the balance he has. The employer has discharged his contractual obligation to pay the full wage. Thereafter there remains only his liability for the tax which he has collected. That is a tax liability for which he alone is liable to the Government as for any other taxes which he may owe."

Prior to the *Crosland* case, the same view had been adopted in the cases of *General Casualty Co. of America v. U. S.*, 205 F (2d) 753 (C.A.5); *U. S. v. Zschach Construction Co.*, 209 F. (2d) 347 (C.A. 10); *Westover v. William Simpson Construction Co.*, 209 F (2d) 908 (C.A. 9); and *Fireman's Fund Indemnity Co. v. U. S.* 210 F (2d) 472 (C.A. 9).

The court of Appeals cited the *Central Bank v. United States*, 345 U.S. 639, case as supporting its position. That case held that an employer's liability to pay withholding taxes, withheld from his employees' wages, arose independently" of the contract between the employer and the United States and the United States could not off-set the amounts due the employer's assignee, under the contract, against such unpaid taxes due it.

In agreeing with the *General Casualty Co. of America v. U. S.* case that "Though measured by the amount of wages, the money due the United States was owing as taxes and not as wages," the decision of the Court of Appeals in the *Crosland* case made the question unanimously decided in the four Courts of Appeal where it has

been raised. The decision is justly and logically sound for to hold otherwise would be to write into the payment bond liabilities for which no contractual assumption has been made.

(Contributed by Thomas B. Whaley, Columbia, South Carolina).

The Iowa Supreme Court has held it is not necessary to prove malice on the part of a drunken driver to recover punitive damages. In *Sebastian v. Wood*, 66 N. W. 2nd 841, defendant admitted intoxication after having plead guilty to a criminal charge of drunken driving arising out of the same accident.

In rejecting defendant's contention that proof of malice is a requisite to exemplary damages, the court relied on two early decisions which allowed exemplary damages upon a showing of gross negligence in the operation of stage coaches. Thus, the gross negligence standard, formerly limited to common carriers, is apparently being extended to private vehicles if the operator is intoxicated.

The opinion also attempts to apply the rationale of cited breach of promise, malicious prosecution and seduction cases to the automobile negligence field, stating "If the conduct complained of is wanton or in wilful disregard of the plaintiff's rights and therefore legal malice, . . . the conduct itself justifies the allowance of punitive damages."

Twenty-eighth Annual Meeting—July 7, 8 and 9, 1955 Hotel del Coronado, Coronado, California

JOHN A. KLUWIN, *Secretary*

MEMBERS' ATTENTION

THE advance registration is extremely heavy but if you have not already received a confirmation of your request for a reservation from the hotel, I would suggest that you write to me because by the time this Journal reaches your hands, all possible confirmations should have been received from the hotel. To avoid delays and disappointments, I ask that you write to me so that I can check into the matter for you.

REGISTRATION, HOTEL RESERVATIONS, AND RATES

I assume that all who plan on going to the convention have already requested accommodations. All available space at the Hotel del Coronado has been reserved, but the hotel has agreed to make arrangements at nearby hotels to take care of the overflow and to permit those housed at other hotels to take their meals at the del Coronado.

In the event that it becomes necessary for you to cancel your reservation before June 15, 1955, the $15.00 registration fee will be refunded to you.

The hotel rate schedule (American plan) is as follows: $14.00 per day per person for two persons in a room with private bath, $18.00 per day per person in a single room with private bath, and $36.00 per day for two persons occupying a lanai room which is a combination bedroom and sitting room with private bath. These rates will apply from July 5 through July 10, 1955.

In order to avoid the nuisance and inconvenience of individual tipping, arrangements have been made to add a 12½ per cent charge to the daily rate which will take care of all tipping for meals, maid service and in and out baggage. Gratuities for other personal services must be taken care of by each guest on an individual basis.

TRANSPORTATION

Special arrangements have been made with the Lachelt Travel Service, Suite 204, 405 Fourteenth Street, Oakland 12, California, to handle your transportation problems. Mr. Lachelt has worked out a very fine program of transportation and tours as evidenced by the brochure which went forward to you with my letter of November 12, 1954. If you have not already made arrangements with the Lachelt Travel Service, it is suggested that you do so at once so as to be able to take advantage of the fine reservations which that agency has been able to secure for you.

GOLF

There will be no golf tournaments this year because it is inconvenient to transport any large number of people from the hotel to the several golf courses in the area. However, any member or guest who desires to play golf can be accommodated on an individual basis by making arrangements through the hotel.

Notice of Proposed Amendments to By-Laws of International Association of Insurance Counsel

A MOTION was made by a member of the Executive Committee at its mid-winter meeting in January, 1955, which motion was unanimously adopted, that Sections 1 and 3 of Article V of the By-Laws be amended as follows:

That the first sentence of Section 1 be amended to read:

"Each applicant shall tender with his application an admission fee of Twenty-Five Dollars ($25.00)."

That the first sentence of Section 3 be amended to read:

"Any member who shall be in default on February 1st of any year in the payment of dues shall be promptly notified thereof by registered mail sent to such member at his address as shown on the Treasurer's records."

NOTICE IS HEREBY GIVEN, pursuant to Article XVI of the By-Laws, that the Executive Committee will present the proposed amendments to Sections 1 and 3 of Article V of the By-Laws for approval at the annual meeting of the Association to be held at the Hotel del Coronado, Coronado, California, on July 7, 8 and 9, 1955.

JOHN A. KLUWIN
Secretary

TWENTY-EIGHTH ANNUAL CONVENTION

HOTEL DEL CORONADO

CORONADO, CALIFORNIA

JULY 7, 8, 9, 1955

Provisional Program
International Association of Insurance Counsel
Annual Convention—July 7, 8 and 9, 1955
Hotel del Coronado
Coronado, California

Wednesday, July 6

2:00 P.M. Registration of Members and Guests.

2:30 P.M. Meeting of the Executive Committee.

Thursday, July 7

8:00 A.M. Continued Registration—Members and Guests.

9:00 A.M. General Session:

1. Roll Call and Reading of Minutes.
2. Address of Welcome and Speaker— Honorable Goodwin J. Knight, Governor of the State of California (subject to be announced later).
3. Response.
4. Introduction of New Members.
5. Report of President.
6. Guest speaker (to be announced later).
7. Report of the Secretary, John A. Kluwin.
8. Report of the Treasurer, Charles E. Pledger, Jr.
9. Report of Memorial Committee.
10. Report of the Editor of the Journal, George W. Yancey.
11. Report of Standing Committees.
12. Announcements:
    - (a) Open Forum, Walter Ely, Chairman
    - (b) General Entertainment, Charles P. Gould, Chairman.
    - (c) General Entertainment for the Ladies, Mrs. Joseph A. Spray, Chairman.
    - (d) Ladies' Bridge and Canasta, Mrs. Walter O. Schell, Chairman.
    - (e) Men's Bridge and Canasta, N. E. Anderson, Chairman.
    - (f) Reception for Wives of New Members, Mrs. Charles P. Gould, Chairman.
    - (g) Reception for New Members, Joseph A. Spray, Chairman.
13. Appointment of Nominating Committee.
14. Announcement by Chairman of Nominating Committee.

Provisional Program
International Association of Insurance Counsel
Annual Convention—July 7, 8 and 9, 1955
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12:30 P.M. Reception for wives of new members followed by a Ladies Luncheon.

1:45 P.M. Open Forum, Walter Ely, Chairman; Richard B. Montgomery, Jr., Vice-Chairman.

1. "Admission of Liability–Strategic Advisability and Other Considerations–Hayes Kennedy, General Claims Attorney, The Greyhound Corporation, Chicago, Illinois, and G. Cameron Buchanan, Trial Attorney of Detroit, Michigan.
2. Actual Demonstration of Extemporaneous Argument to Jury, with Emphasis on Issue of Damages:
   For the plaintiff: Frank S. Knapp, Houston, Texas.
   For the defendant: Mark Martin, Dallas Texas.
3. Audience Discussion, as time permits.

2:00 P.M. Ladies Bridge and Canasta Tournament.

6:00 P.M. "Coketail" Party for the Small Fry.

6:00 P.M. President's Reception.

8:00 P.M. Dinner.

9:00 P.M. International Cabaret, dancing.

Friday, July 8

9:00 A.M. Open Forum.
Presiding: Richard B. Montgomery, Jr., Vice-Chairman and Walter Ely, Chairman.

1. "What is the Defense Lawyer Worth?"–Hon. Clarence B. Runkle, Judge of the Superior Court, County of Los Angeles, State of California.
2. "The Processes of Undercover Investigation".
   (a) Generally.
   (b) Motion Pictures–Demonstration–Irving J. Stein and Sam M. Stein, Stein Investigation Agency, Los Angeles, California.
3. Audience Discussion, as time permits.

Provisional Program
International Association of Insurance Counsel
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Hotel del Coronado
Coronado, California

2:00 P.M. Men's Bridge and Canasta Tournament.

Sightseeing—for those not participating, busses will be provided for trips to Tijuana in Old Mexico; also, boats are available to view the Bay of San Diego.

Swimming in the outdoor pool or at the beach of Coronado Strand.

Tennis Courts and other recreational facilities are available.

6:00 P.M. "Coketail" Party for the Small Fry.

6:00 P.M. Humble Humbug's Mint Julep Party.

7:30 P.M. Annual Banquet followed by dancing.

Saturday, July 9

9:00 A.M. General Session.

1. Guest Speaker (to be announced later.)
2. Report of the Winners of Bridge prizes and Canasta prizes, Charles P. Gould, Chairman, General Entertainment.
3. Unfinished Business.
4. New Business.
5. Report of Nominating Committee.
6. Election of Officers and Members of the Executive Committee.
7. Induction of New President, Lester P. Dodd.

12:15 P.M. Adjournment by President, Lester P. Dodd.

2:00 P.M. Meeting of New Executive Committee.

2:00 P.M. Meetings of Committees appointed by President Lester P. Dodd for 1955-56, place of meeting of the various committees to be announced.

Convention Committees

JUNIOR ENTERTAINMENT COMMITTEE

Chairman: Phillips, Mrs. Thomas M. (Edna)—Houston, Texas.

Vice-Chairman: Atkins, Mrs. Clyde C. (Esther)—Miami, Florida.

Baier, Mrs. Milton L. (Madonna)—Buffalo, New York.
Chilcote, Mrs. Sanford M. (Mildred)—Pittsburgh, Pa.
Eggenberger. Mrs. William J. (Elsie)—Detroit, Mich.
Johnson, Mrs. F. Carter, Jr., (Josephine)— New Orleans, La.
Knepper, Mrs. William E. (Lucille)—Columbus, Ohio.
Rowe, Mrs. Royce G. (Marie)—Chicago, Ill.
Sweitzer, Mrs. J. Mearl (Margaret)—Wausau, Wis.

MEN'S BRIDGE AND CANASTA COMMITTEE

Chairman: Anderson, Newton E.—Los Angeles, Calif.

Vice-Chairman: Ely, Wayne—St. Louis, Mo.

Brown, Oscar J.—Syracuse, N. Y.
Creede, Frank J.—San Francisco, Calif.
Driscoll, John G., Jr.—San Diego, Calif.
Dunn, Gerold C.—Los Angeles, Calif.
Kelly, Ambrose B.—Providence, R. I.
Waters, W. W.—Los Angeles, Calif.

MEN'S COMMITTEE ON RECEPTION FOR NEW MEMBERS

Chairman: Spray, Joseph A.—Los Angeles, Calif.

Vice-Chairman: Gooch, J. A.—Fort Worth, Texas.

Christovich, Alvin R.—New Orleans, La.
Grubb, Kenneth P.—Milwaukee, Wis.
Hayes, Gerald P.—Milwaukee, Wis.
Lloyd, L. Duncan—Chicago, Ill.
McGough, Paul J.—Minneapolis, Minn.
Stichter, Wayne E.—Toledo, Ohio.
White, Lowell—Denver, Colo.

MEN'S GENERAL CONVENTION ENTERTAINMENT COMMITTEE

Chairman: Gould, Charles P.—Los Angeles, Calif.

Vice-Chairmen: Reed, Peter—Cleveland, Ohio.
Schell, Walter O.—Los Angeles, Calif.
Sedgwick, Wallace E.—San Francisco, Calif.

Ahlers, Paul F.—Des Moines, Iowa.
Archer, James W.—San Diego, Calif.
Baier, Milton L.—Buffalo, New York.
Bronson, E. D.—San Francisco, Calif.
Carey, L. J.—Detroit, Mich.
Crider, Joe, Jr.—Los Angeles, Calif.
Driscoll, Lawrason—San Francisco, Calif.
Ely, Walter—Los Angeles, Calif.
Gillen, William A.—Tampa, Fla.
Moss, Sidney A.—Los Angeles, Calif.
Nelson, Robert M.—Memphis, Tenn.
McNeal, Harley J.—Cleveland, Ohio.
Veatch, Wayne—Los Angeles, Calif.

Ex-officio: Snow, Gordon H.—Los Angeles, Calif.

WOMEN'S BRIDGE AND CANASTA COMMITTEE

Chairman: Schell, Mrs. Walter O. (Bibian)—Los Angeles, Calif.

Vice-Chairman: Gongwer, Mrs. J. H. (Gladys)—Mansfield, Ohio.

Anderson, Mrs. J. H., Jr. (Snow)—Raleigh, N. C.
Brown, Mrs. Oscar J. (Mary)—Syracuse, N. Y.
Dickey, Mrs. J. Roy—Winter Park, Fla.
Groce, Mrs. Josh H. (Julia)—San Antonio, Tex.
Lucas, Mrs. Wilder (Ruth)—St. Louis, Mo.
McKesson, Mrs. Theodore G. (Ruth)—Phoenix, Ariz.
Phelan, Mrs. Thomas N. (Ray)—Toronto, Canada.
Shannon, Mrs. George T. (Tommie)—Tampa, Fla.
Sprinkle, Mrs. Paul C. (Mary)—Kansas City, Mo.
Tilson, Mrs. Elber H. (Gratia)—Los Angeles, Calif.
Topping, Mrs. Price H. (Barbara)—New York, N. Y.
White, Mrs. Lowell (Laura-Louise)—Denver, Colo.
Yancey, Mrs. George W. (Martha)—Birmingham, Ala.

WOMEN'S COMMITTEE ON RECEPTION FOR WIVES OF NEW MEMBERS

Chairman: Gould, Mrs. Charles P. (Mary)—Los Angeles, Calif.

Vice-Chairman: Pledger, Mrs. Charles E., Jr. (Beryle)—Washington, D. C.

Anderson, Mrs. Newton E. (Ada Mae)—Los Angeles, Calif.
Blanchet, Mrs. G. Arthur (Lucille)—New York, N. Y.
Caverly, Mrs. Raymond N. (Rene)—New York, N. Y.
Dempsey, Mrs. James (Mabel)—White Plains, N. Y.
Faude, Mrs. John P. (Helen)—Hartford, Conn.
Fellers, Mrs. James (Randy)—Oklahoma City, Okla.
Grubb, Mrs. Kenneth P. (Marguerite)—Milwaukee, Wis.
Kluwin, Mrs. John A. (Noreta)—Milwaukee, Wis.
Lloyd, Mrs. L. Duncan (Olivia)—Chicago, Ill.
Moss, Mrs. Sidney A. (May)—Los Angeles, Calif.
O'Kelley, Mrs. A. Frank (Louise)—Tallahassee, Fla.
Raub, Mrs. Edward B., Jr. (Madeline)—Indianapolis, Ind.
Schlotthauer, Mrs. George McD. (Betty)—Madison, Wis.
Varnum, Mrs. Laurent K. (Maryellen)—Grand Rapids, Mich.
Wicker, Mrs. John J., Jr. (Kate)—Richmond, Va.

WOMEN'S GENERAL CONVENTION ENTERTAINMENT COMMITTEE

Chairman: Spray, Mrs. Joseph A. (Loeta)—Los Angeles, Calif.

Vice-Chairman: Betts, Mrs. Forrest A. (LaVelle)—Los Angeles, Calif.
Dodd, Mrs. Lester P. (Edith)— Detroit, Mich.
Snow, Mrs. Gordon H. (Dorothy) —Los Angeles, Calif.

Ahlers, Mrs. Paul F. (Amirrette)—Des Moines, Iowa.
Anderson, Mrs. Wilson (Margaret)—Charleston, W. Va.
Christovich, Mrs. Alvin R. (Elyria)—New Orleans, La.
Cull, Mrs. Frank X. (Madeleine)—Cleveland, Ohio.
Fowler, Mrs. Cody (Maude)—Tampa, Fla.
Gooch, Mrs. J. A. (Adrienne)—Fort Worth, Tex.
Haywood, Mrs. Egbert L. (Margaret)—Durham, N. C.
Hoffstot, Mrs. William H., Jr. (Susan)—Kansas City, Mo.
Marryott, Mrs. Franklin J. (Stephanie)—Boston, Mass.
Moody, Mrs. Denman (Ted)—Houston, Tex.
McGinn, Mrs. Denis (Catherine)—Escanaba, Mich.
Porteous, Mrs. William A., Jr. (Lois)—New Orleans, La.
Shackleford, Mrs. R. W. (Iva)—Tampa, Fla.
Smith, Mrs. Forrest S. (Harriet)—Jersey City, N. J.
Stichter, Mrs. Wayne E. (Irene)—Toledo, Ohio.

Entertainment at Annual Meeting—Coronado, California

CHARLES P. GOULD, *Chairman*
Los Angeles, California

THE second Convention of the Association to be held in the State of California, will be at the beautiful Hotel Coronado, located on the waters of the Pacific. In keeping with the beauty of the surroundings the entertainment committee has been authorized and instructed by Stanley Morris to provide an outstanding program during your stay in Coronado.

The program will commence with a Reception for the wives of new members which is scheduled for 12:30 P.M., on Thursday, July 7th, 1955.

Following the reception the ladies luncheon will be held at which all ladies attending the convention will partake of the cuisine for which the Coronado Hotel is noted. The afternoon of July 7th, will be devoted to the Bridge and Canasta Tournaments for the ladies. The men's tournaments will be held the following afternoon. Newton Anderson, Chairman of the Men's Tournament, and Bibian Schell, Chairman of the Women's Tournament have promised a dazzling display of awards to the successful participants. In view of the fact that there will not be an organized golf tournament, it is expected that the card tournaments will be heavily patronized and our two chairmen and their committees promise to provide convenience and enjoyment of all who will enter.

The advance registration indicates a record number of Small Fry will attend this convention. Coronado is admirably equipped to provide a constant source of entertainment for children of all ages. A Coketail Party will be given for the Small Fry running concurrently with the President's Reception. These events will start at 6:00 P.M., on Thursday, July 7th.

After dinner the traditional International Cabaret will be held. Not only will there be an orchestra for dancing, but refreshments will be available, and the committee has promised an outstanding show for the evening.

The men's bridge and canasta tournament will be held the afternoon of Friday, July 8th. For those not participating busses will be provided for trips to Tijuana in Old Mexico. For those who are interested in sightseeing, the bay of San Diego will be viewed from boats by those who are inclined to the sea. The recreational facilities of the hotel, which includes a beautiful out-door swimming pool, the beach of the Coronado Strand for swimming, a group of professional tennis courts, and many other athletic and recreational facilities will be made available.

On Friday, July 8th, at 6:00 P.M., the Humble Humbugs will stage their Annual Mint Julep Party for the members of the Association. During this activity the Junior Group will have their second Coketail Party. The Mint Julep Party will be followed by the Annual Banquet. Special seating arrangements will be provided for the members of the Executive Commitee and Officers. This will be followed by an evening of dancing and refreshments.

The entire entertainment committee join with the officers of the association in promising the entertainment at Coronado will be in keeping with the largest and finest convention that has ever been held by the International Association of Insurance Counsel.

The Value of the Law-Science Short Courses to Insurance Counsel in Trial of Personal Injury Cases

HUBERT WINSTON SMITH, LL.B., M.D.*
Austin, Texas

IN February 1955, more than two hundred trial lawyers from twenty-five states attended the Mid-winter Law-Science Short Course designed to afford training in medical science, and medicolegal trial technique, for those who must cope daily with personal injury problems and litigation. During the week beginning Monday, July 18, 1955, an even larger number of eager students interested in these problems is expected to attend the full-week Short Course to be conducted at the Hotel Morrison in Chicago.

During the past five years the Law-Science Institute has conducted approximately eighteen such Institutes in various metropolitan centers. More than three thousand trial counsel have attended, many returning time after time to widen and deepen their knowledge. The Law-Science Institute, which is sponsored jointly by the Schools of Law and of Medicine of the University of Texas, is dedicated to research and teaching calculated to advance effective integration of law with the physical, medical, psychological and social sciences. It has endeavored to pioneer continuing medico-legal education, of an impartial character, for benefit of trial lawyers and others professionally concerned with the handling of personal injury claims. In presenting successive medical topics, an attempt is made to use eminent medical specialists who are able, and willing, to give an objective account of the relation, if any, of various types of traumatic stimuli to the causation or aggravation of disease or disability.

Even in the early days of these Courses leading defense counsel registered in large numbers and showed a keen interest in forwarding this two-sided, impartial approach to the contested problems of the personal injury field. Since 1952, the defense counsel and claims representatives of leading insurers have been attending the Courses in constantly increasing numbers. An eminent defense counsel who recently attended our Mid-winter Institute thought it might be interesting to the insurance bar generally to hear something of the philosophy, rationale, and content of the six day Law-Science Short Course such as will be conducted in Chicago in July.

THE RAPID RISE OF SCIENTIFIC PROOF IN THE HANDLING OF PERSONAL INJURY LITIGATION

In his recent book on "The Art of Advocacy", Lloyd Paul Stryker implies that the art of advocacy has waned perilously. This may be subject to doubt, in the minds of many, but even if it is true, it may be no just cause for regret if it be true, as we staunchly believe, that the *science* of advocacy is waxing as the *art* wanes. Most of us associate the art of advocacy with personal prowess, with studied competition for jury favor, with adroit appeal to the emotions on the theory that persuasion is more cogent than proof. This older type of advocacy, however, is passing rapidly into discard with the emergence of what might be called true masters of the science of proof; advocates capable of evaluating and dissecting, and presenting forcefully, the most complex chains of medical research and testimony.

Not so long ago, the defense lawyer was loathe to undertake cross-examination of the medical aspects of the case feeling he could not cope with an astute physician and fearing that the net result of inquiry would be to recapitulate, deepen and reenforce the testimony given on direct-examination. This may still be the course of choice in a particular case but if medical causation or disability are contested issues, vigorous medical cross-examination may be not only expedient but essential. The claimant's counsel is seeking not only to establish responsibility of the defendant, but to obtain an adequate, more adequate, or "most" adequate award. The claimant's counsel has set for himself more ambitious

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goals than in the past and this embraces painstaking development of actual, probable and possible consequences of injuries, including the secondary results of indicated treatment. It seems very doubtful whether the defense counsel can fulfill his mission of holding verdicts to the level of "just awards" without meeting the medical phases of litigation fully, both in preparation and trial.

If we assume that the premiums collected by responsible insurance companies constitute a trust fund to be used in the reparation of meritorious claims founded upon legal liability, defense counsel is performing a social as well as a private service in protecting the trust corpus against unwarranted dissipation.

Defense counsel can only carry out this trustee function of separating the meritorious from the unfounded or extortionate claim by distinguishing science from pseudo-science and he needs, therefore, to acquaint himself as thoroughly as possible with the injurious effects of stimuli upon the several organ systems but especially the limiting features and the essential criteria of proof which the plaintiff should be made to satisfy.

The strength of one's resistance as defense counsel is very apt to bear a relation to the depth of one's understanding of the medical case. The fact that Legal Medicine has not been an orthodox subject in law school curricula makes it even more necessary that this deficit in the education of the trial lawyer be met by systematic Short Courses at the graduate level.[1]

THE FOUR ESSENTIAL CATEGORIES OF SCIENTIFIC PROOF IN PERSONAL INJURY CASES

Experience reveals that four essential categories of problems must be carefully analyzed in appraising personal injury claims, these being:

1. *Probelms of identification* (diagnosis and differential diagnosis: does the claimant actually have the disease or disability for which he seeks compensation?);

2. *Problems of causation* (Is such a causal sequence as that alleged here possible in the eyes of modern medical science? Considering the known criteria of proof, can it be said that there is a probable causal connection in the case at bar?);

3. *Problems of effects* (Is the disability temporary or permanent, partial or total? Does the claim involve an element of malingering?); and, finally,

4. *Problems of rehabilitation* (Has the claimant done all that his duty requires toward his own care, cure and rehabilitation?[2])

Against this framework of thought, we have endeavored in the Law-Science Short Course on "Personal Injury and Problems of Medicolegal Litigation" to develop a realistic and fascinating approach to the structure and function of the human body and the injuries which the several organ systems may sustain. We have recognized the existence of nine separate organ systems, taking as a tenth area the unified personality as a whole as revealed by modern neurology, psychiatry and psychology.[3] The Short Course does not assume any extensive biological knowledge on the part of the lawyers in attendance. An attempt is made to indoctrinate registrants in the structure and function of each organ system: just what it is supposed to do when functioning normally. Through the use of eminent specialists, attention is then shifted to consideration of possible and probable effects of alleged traumatic stimuli upon the several organ systems. Here it is very important to consider what criteria of proof can be specified scientifically which the plaintiff should be obliged to meet in making out a *prima facie* case of causal connection. This requires a consideration of the several derangements or pathological deviations which may occur in a particular organ system, and whether these can be plausibly related to traumatic stimuli, in light of scientific knowledge, or must be rejected as speculative. Nor can one ignore the fact that both physical and psychic stimuli may produce injurious effects on occasion and that the disability may be due to a physical lesion, to a purely psychic condition or to a combintion of phy-

[1] The University of Texas Law School now offers a four hour elective course in "Legal Medicine and Elements of Medicolegal Litigation" for benefit of students who anticipate that they will enter trial practice or have connection with scientific evidence in civil or criminal litigation.

[2] See Smith, Hubert Winston: "Cross-examination of Neuropsychiatric Testimony in Personal Injury Cases", 4 Vanderbilt L.Rev. 1-62 (1950).

[3] (1) The integumentary system (or skin); (2) the skeletal system; (3) the muscular system; (4) the respiratory system; (5) the digestive system; (6) the cardio-vascular and lymphatic systems; (7) the urogenital system; (8) the endocrine system; and (9) the nervous system.

siological and psychological resultants.[4] Such an approach, and study, involves development of a new scientific filter for personal injury claims based upon skeptical scrutiny. It implies a constant search for scientific criteria of proof and an effort to determine the concrete circumstantial evidence which will help to authenticate or discredit the claim of causation or the degree of consequent injury or disability. Through this new development and proper utilization of scientific proof, the margin of error in dealing with medical phases of a case may be greatly reduced with much benefit to society, to litigants and to counsel.[5]

THE SHORT COURSE AS AN INTELLECTUAL SYMPHONY

The Law-Science Short Course is widely recognized as a rigorous type of Spartan education. Registrants attend morning, afternoon and evening sessions with every other night reserved for rest. Daily sessions may run ten or eleven hours excluding luncheon and dinner intermissions and ten minute recesses spaced at intervals of an hour and a half. As many as fifty lecturers or more, drawn from distinguished medical authorities and leaders of the trial bar are unified into a teaching staff. The plan has been to proceed from general principles to specific problems. In general, the lecturers make alternating appearances, usually for not more than twenty-five minutes at a time, or sit as members of panels, with appropriate repartee between panels of leading trial lawyers and panels of medical experts. The audience is also given appropriate opportunity to send up written questions to be propounded to the experts. Throughout the proceedings, an attempt is made to stimulate and inspire the registrants as well as to impart instruction of immediate practical value in the analysis of personal injury claims and cases. Somewhat of a "looping system" has been developed which entails a reasonable amount of summing up, and recapitulation. Lecturers are encouraged to use audio-visual material. Today most physicians have access to beautiful Kodachrome slides which richly illustrate the points they desire to present. It is not unusual to have motion pictures shown on a subject such as the intervertebral disc. In the last two or three years, great progress has been made in the development of a rich variety of trial sequences in which leading counsel carry expert witnesses through direct and cross-examination. We have found this affords simultaneous opportunity for indoctrination in the medical lore of the subject and in medicolegal trial technique. The general practice has been to terminate the Short Course, on the sixth day, with a trial sequence which runs for a half a day, or an entire day, using a judge, jury and authentic trial conditions to demonstrate direct and cross-examination of medical experts. On occasion, law students and select groups of laymen have been permitted to attend the climactic trial, as a courtesy of the Law-Science Institute and the practicing bar. The final trial has sometimes been conducted before a total audience of five hundred to eight hundred persons. Invariably, spectators have been astonished at the consummate skill of the participating counsel in examining and cross-examining the medical experts. They have also been delighted by the cogency, brilliance and versatility of the arguments to the jury.

TRANSITION TO USE OF MEDICAL BRIEFS

Today, in increasing measure, trial counsel are making careful analyses of the essential medical contentions in each personal injury case, and are developing appropriate medical trial briefs to enable them to conduct effective cross-examination.[6] It is true that some of the present masters of medical cross-examination have acquired their knowledge and skill through patient, prolonged, individual study over

[4]Smith, H. W.: "Psychic Interest in Continuation of One's Own Life: Legal Recognition and Protection", 98 U. of Pa. L.Rev. 781 (1950); Smith, H. W. and H. C. Solomon; "Traumatic Neuroses in Court", 30 Va. L. Rev. 87 (1943); Smith, H. W. and Stanley Cobb: "Relation of Emotions to Injury and Disease: Legal Liability for Psychic Stimuli", 30 Va. L. Rev. 193 (1944).

[5]Smith, H. W.: "Scientific Proof and Relations of Law and Medicine", 20 U. of Chi. L. Rev. 243 (1943); Smith, H. W.: "Cooperation Between Law and Science in Scientific Proof", 19 Tex. L. Rev. 414 (1941).

[6]Gair, Harry A.: "Medicolegal Trial Technique From the Standpoint of the Plaintiff", 31 Tex. L. Rev. 707 (1953); Berman, Emile Z.: "Medicolegal Trial Technique From the Defendant's Point of View" 31 Tex. L. Rev. 724 (1953). These studies form a part of twelve articles on personal injury problems constituting a special "Law-Science Symposium" published in the Texas Law Review and still obtainable through the Institute at $2.00 per copy.

a long span of years. Notwithstanding this fact, many of these self-trained counsel have declared repeatedly that the training and indoctrination, and habits of thought one may acquire through the Law-Science Short Courses, are well-nigh indispensable to the seasoned advocate who desires to keep abreast of the rapidly developing field of Legal Medicine. It is important to remember that Legal Medicine is not a single field or specialty but a composite of the legally relevant contributions of all the medical specialities. It is an interesting fact that the registrants at the Short Courses are drawn chiefly from the ranks of experienced, seasoned trial counsel and claims men though we should like to see an increasing number of young lawyers in attendance at the Institutes. It is an inspiring tribute to the unselfishness of the leading trial lawyers at the American Bar that they have been willing to come, often at considerable inconvenience or sacrifice of personal interests, to participate as lecturers in the Law-Science Short Courses. They have shown a readiness to pass on, without stint or reservation, their wisdom, skill, experinece and medicolegal trial technique, and to demonstrate, through trial sequences, "how they practice what they preach".

Shortly after the Mid-winter Short Course in February, we received a letter from a top defense counsel who had attended, suggesting that knowledge acquired at the Institute had enabled two of his associates (who had also attended) to attain very striking results in the defense of two lawsuits. He told of an orthopedic case where the minimum demand, in settlement negotiations, was for $40,000, but where a proper scientific approach in defense of the case at trial led to a verdict of $1500. The other case involved a traumatic neurosis claim where the minimum settlement demand was for $25,000 and the jury returned a verdict for only $1,000. We do not mean to imply that the invariable effect of scientific evaluation will be to achieve reduction in claims or verdicts. In some instances it may substantiate the need for a higher settlement or verdict than anticipated by producing confirmation of causal relations or disabling effects not previously recognized or adequately documented. It stands to reason, however, that if the plaintiff's claim is untenable, conjectural or exaggerated, when viewed in light of proper scientific standards, the defense counsel may often achieve noteworthy victories if he is capable of directing the pitiless spotlight of scientific knowledge upon the weak elements of the plaintiff's case.

LAW-SCIENCE SHORT COURSES AS A QUEST FOR COMMON IDEALS WHICH MAY UNIFY THE TRIAL BAR

The science of proof, making full use of scientific evidence, works simultaneously to promote the interests of society and of litigants, for in seeking out truth, it advances the likelihood of a just award while curtailing the risks that untenable or exaggerated claims will gain undeserved compensation. It may be possible to show that the pain complained of is a symptom of an independent pre-existing or subsequently appearing disease; that it is referred from some distant site to the area traumatized; that it is temporary only, and will soon vanish, or may be alleviated by measures which will not produce addiction. Rarely, indeed, will traumatic injury produce pain of such character as would indicate or justify the performance of a lobectomy. But defense counsel must be aware of these facts, and of the vast wealth of limiting scientific principles, if they are to check successfully the enthusiastic claims of the plaintiff's lawyer. Only when two adversaries, well trained in the science of proof, set themselves to ventilating a vexatious medicolegal problem will all the relevant materials for decision, including the latest scientific literature, be brought forward. Doctors themselves are often too busy to mobilize the current literature unless stimulated and aided by the trial lawyer.[7]

[7]Consult the leading medical texts suggested by the Law-Science Institute; bring current medical literature up to date by inspecting Index Medicus (the quarterly cumulative Medical Index published by the American Medical Association), to be found in any medical library. The references are listed under alphabetical catchwords as well as under names of authors. When one has learned who the leading authorities in the field are, he can check the author's index for subsequent writings. If a desired reprint cannot be had on loan from the State Medical Library, the attorney can procure a photostatic copy of any desired medical article, at nominal cost, from the Army Medical Libarary, Independence Avenue, Washington, D. C. The Law-Science Institute has itself developed and published close to 150 studies dealing with various aspects of scientific proof. The first National Symposium on "Scientific Proof and Relations of Law

Today, when nine out of ten cases handled in the trial courts involve personal injury claims, a new and necessary dimension has been added to legal analysis and trial practice. Most trial lawyers who have undertaken to study the human body, its structure, function and possible injuries, have found they have entered upon an intellectual kingdom which is full of interest and stimulation. By attending a succession of Short Courses, by acquiring a small number of recommended medical texts, by undertaking the preparation of medical trial briefs, countless advocates have been able to ascend to higher levels of functioning, where science and art are conjoined to produce a searching out of evidence and proofs of a quality never attained in our courts before.[8] Furthermore, these new approaches can lay the foundations for development of a more effective science of compromise negotiation. If lawyers on the two sides of the docket can be brought to the point of using qualified medical experts and making fuller pre-trial disclosure, in furtherance of *bona fide* compromise negotiations, many cases now being tried can be disposed of at the conference table with all the advantages which speedy and scientific disposition holds for the contending parties and the opposing counsel. It is our considered opinion, in view of all the foregoing considerations, that the modern defense counsel, and men engaged in claims work, imperatively need full, and continuing training in the medicolegal aspects of the problems which recur daily in preparation, compromise or trial of personal injury cases. It has been our effort to proportion time to the frequency with which these problems arise. Thus the problems of alleged ruptured intervertebral disc, and of head injury, must command more time than relation of trauma to causation or aggravation of cancer.[9] We are trying, increasingly, also, to interweave the medical and legal aspects by following the medical presentations of a particular topic with immediate medicolegal presentations of a particular topic with immediate medicolegal commentary, and dissection, carried out by top trial lawyers drawn from the two sides of the bar. This has proven to be a popular and constructive innovation.

THE LAW-SCIENCE CERTIFICATE; THE LAW-SCIENCE ACADEMY AND FOUNDATION

We have been interested in developing a new fraternity of trial counsel made up of men intent upon bringing the science of litigation abreast of the art of advocacy. Upon completion of the Short Course, each registrant receives a beautiful certificate attesting his graduation. We are hopeful that each such graduate will become an exemplar and supporter of the Law-Science philosophy in his practice and community.

As truth and understanding deepen, a new basis emerges for unification of ideals and interests of defense counsel and plaintiffs' lawyers.

The Law-Science Academy of America, of which Mr. Harry A. Gair of New York City, distinguished plaintiffs' counsel, is currently President, and the Law-Science Foundation of America, of which Mr. Newton Gresham of Houston, eminent defense counsel, is Chancellor, are charitable corporations formed by top leaders of the trial bar, to further and foster, and increasingly deepen, the research and teaching activities of the Law-Science movement.[10] All of us who subscribe to the Law-Science philos-

[8]Our hypothesis is that a state of conviction is produced in the trier of fact when the doors of doubt are closed and that this is accomplished most successfully by the diversified use of the six components of proof, in an effort at cross-corroboration, and full utilization of both persuasive and probative factors. Smith, H. W.: "Components of Proof in Legal Proceedings", 51 Yale L. J. 537 (1942).

and Medicine", published in leading medical and legal journals in 1943 contained approximately fifty studies. The second National Symposium on "Scientific Proof and Relations of Law and Medicine" contained more than sixty studies. In general, each study was published concurrently in a leading medical and legal journal. Unfortunately, no Master Index is now available. The Index to the first Symposium will be found in Vol. 29 of Va. L. Rev.; the Index to the second Symposium series will be found in Vol. 24 of the North Carolina L. Rev. Allusion has been made, *supra* f.n.6 to the Law-Science Symposium in Tex. L. Rev. Attention might also be drawn to the new Law-Science Symposium, containing 470 pages (more than 200 of which are devoted to personal injury problems), published in Vol. 3, Journal of Public Law, 287-757 (1954), obtainable through the Law-Science Institute at $4.00 per copy.

[9]Smith, H. W. and F. Keith Bradford: "Medicolegal Aspects of Craniocerebral Injuries", 3 J. of Public Law 663-736 (1954).

[10]All trial counsel who have completed Law-Science training and who are interested in developing common ideals for the Trial Bar, and to forward the development of the science of proof are eligible to apply for membership in the Law-Science Academy and the Law-Science Foundation.

ophy believe that what is fact in science cannot be false in law; that true science knows no friend, and that as Daniel Webster thought and said, justice is the chiefest interest of mankind. Since the defense counsel must resist stoutly, fend off and seek to discredit, every species of claim which is unscientific, or exaggerated, even though this involves simple mistake rather than conscious fraud, it stands to reason that he must work with the tools of science. To work without them is too perilous a course, both to counsel and to client. We are indeed hopeful that the great support which the defense counsel of this country have been giving to the Law-Science Short Courses will continue unabated in the days to come.

Practical Application of the Federal Discovery Rules Together With the Proposed Amendments

JOSH H. GROCE
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THE Federal Discovery Rules, when used in connection with Rule 16—the pretrial hearing rule and the summary judgment Rule 56—have a three-fold purpose: (1) to narrow the issues so that evidence need be produced only on matters actually controverted; (2) to obtain evidence for use at the trial; and (3) to obtain information as to the existence of other evidence which might be used.

Depositions were wholly unknown to the common law and are strictly creatures of the statute, code or rule providing for them. The first discovery procedure in the English-speaking world was in the ecclesiastical courts of England, which was later followed by the Courts of Chancery, and did permit the filing of interrogatories along with the complaint, and the complainant was thereby permitted to search the conscience of his adversary through means of these written interrogatories.

However, since I have been requested to discuss the practical application of the Federal Discovery Rules rather than their theory and history, I will not dwell any further on the background of the rules. After all, they have been in force now for more than sixteen years.

When I was requested to discuss the Federal Discovery Rules, I remembered my course in Civil Procedure in law school, and how dry, boring and difficult it was, because it was a mere discussion of procedural statues that you had to practically memorize. The thought then occurred to me that it might be more interesting if I should discuss these rules as applied in an actual case, and I immediately thought of my own case of *Celanese Corporation of America v. John Clark Industries,* 214 Fed. (2) 551, wherein the plaintiff took the defendant's deposition three times; defendant took the plaintiff's deposition four times; we had demands for admissions; motions for production of documents; written depositions; motions for summary judgment; pretrial hearings, and in fact we practically ran the gamut of the discovery procedures in that particular case. So, with the thought that this might be a more interesting method of presentation of a discussion of the Federal Discovery Rules, permit me to give a background of the Celanese case.

In the Summer of 1950 we were employed to represent some eight insurance companies and John Clark Industries, Inc. which was under-insured, in a claim against Celanese Corporation of America, the basis of the claim being that Celanese had warranted a certain hydraulic fluid, Lindol HF-X, to be non-flammable, whereas actually it was not non-flammable, but caused Clark's plant to burn to the ground. Clark was in the hydraulic die-casting business. The hazard of fire is one which is inherent in such business, since the die-casting operation must be carried on under extremely high pressures of 1000 pounds per square inch, which pressures are transmitted by means of an hydraulic fluid. Immediately adjacent to the hydraulic press is a furnace or pot which operates with temperatures up to 1500 degrees and which keeps the metal molten so that it may be poured into the machine for the purpose of casting it into the desired form.

Clark had been using, as an hydraulic fluid, Aroclor, a product of Monsanto

Chemical. This was apparently satisfactory from the standpoint of not catching on fire. However, the product, from other standpoints, was unsatisfactory for Clark's use. In the Summer of 1949 Clark wrote to Celanese at its Home Office in New York to inquire of its product Lindol HF, an oily substance manufactured from coal tar and chemically known as Tricresyl Phosphate. Mr. Bell, the Director of Sales of the organic phosphates department, chemical division, of Celanese, personally wrote back to Clark giving the specifications of Lindol HF and describing it as non-flammable and stating that it would not support combustion. In the same communication, Mr. Bell stated that Celanese was putting a new product on the market which would combine all the advantages of Lindol HF with a superior viscosity at a lower price.

Clark then wrote back asking for details of this new product and in response Celanese telegraphed Clark on August 5th stating that Lindol HF-X tests had been completed and offering it at $2.30 per gallon. Shortly thereafter, Clark forwarded its order by mail for 104 gallons of Lindol HF-X, and the fluid arrived in San Marcos and was placed in Clark's hydraulic lines about September 1, 1949, where it remained until December 19th, when a line break occurred in the hydraulic lines; the hydraulic fluid sprayed over to the furnace and up to the roof and immediately caught on fire and burned the plant down.

Immediately upon the happening of the fire, Clark reported to his insurance companies that he contemplated suing Celanese for breach of warranty, and when the companies were ready to pay off, Clark declined to sign any loan receipts or other agreements that would give any one company the right to control the third party action, but it was agreed that when the insurance companies and Clark would agree upon common counsel, final arrangements would then be made as to the methods of closing the case. Therefore, one of the first things that we did after being employed by them all was to prepare a loan receipt agreement, which was signed by Clark in favor of the insurance companies, which agreed that the insurance payments had been made as a loan to be repaid to the companies but only out of any recovery from Celanese.

It so happened that the attorney for service in Texas of Celanese was a good lawyer friend of ours, so that shortly after we were employed, we wrote him and told him of our employment, and opened the way for settlement discussions. Of course, some of our records were destroyed by fire, and both the attorney for the defendant and we were very anxious to obtain complete copies of all of the correspondence relative to the purchase and sale of this Lindol HF-X, so we sat down with the defendant's lawyer on several occasions and had an informal pretrial hearing in which each of us tried to fill in the other's file so that we would each have in our possession all of the documents having to do with the contract of the purchase and sale of this product. Much to our surprise, we found that at the time this Lindol HF-X was shipped to Clark, a so-called aknowledgment-of-order form was likewise forwarded to Clark under the terms of which it was recited that Celanese did not warrant its product at all as being anything other than its standard product; that it would not be liable for any damages under any circumstances from the use of said product, and that the buyer assumed all risk of the use of said product; and that the measure of damages, if any, would under no circumstances be greater than the cost price of the fluid.

Of course this was somewhat disturbing to us, since disclaimers of warranty are upheld as not being against public policy in Texas. See *Pyle v. Eastern Seed Company,* 198 S.W. 2d 562. Furthermore, we discovered that on October 18th, some six or seven weeks after Clark started using the fluid, he received a vague telegram from Celanese stating "Necessarily Withdrawing Lindol HF-X from The Market"—and offering to furnish another fluid and giving the quotation of the price, but giving no hint of any dangers in connection with the further use of said product.

After we had the complete files of correspondence in connection with the purchase and sale and use of this product, we offered to discuss settlement, but since no settlement could be worked out we filed suit, and it was promptly removed to the federal court by the defendant. Now, with the case in the fedaral court, all of the discovery procedures were available to us for the purpose of preparing our case for trial. So, for a moment, let me discuss, in a general way, some of these discovery rules. There are now before the Supreme Court several proposed amendments to

these rules and I will try to discuss the effect of such amendments if adopted as I go along. See 16 F.R.D. following page 396.

Probably the most widely used of all of the discovery rules is Rule 29, which provides:

> "If the parties so stipulate in writing, depositions may be taken before any person at any time or place upon any notice and in any manner, and when so taken may be used like other depositions.

I am sure that ninety percent, at least, of all the depositions taken by our firm are taken pursuant to an agreement with opposing counsel. We agree upon a time and place mutually convenient to us and the witnesses. If the witness is our witness and the other side desires to take his deposition, we voluntarily produce him, because most of the good lawyers in our part of the country operate under the principle that they will voluntarily do for opposing counsel everything that opposing counsel could force them to do,—thereby relieving both sides of unnecessary work and trouble. Therefore, let me commend Rule 29 to you, with the suggestion that these discovery procedures should be in most instances carried out by agreement between the parties.

Rule 27 provides for the perpetuation of testimony prior to the filing of a suit. Actually this is not really a discovery rule and frankly, although I have been an active trial lawyer for thirty years, I have never found occasion to use a deposition for the perpetuation of testimony, although it has been available in the form of a Texas statute to me at all times. Therefore, since my time is limited, I will not undertake to discuss a rule which is so infrequently used.

Rule 31 provides for depositions on written interrogatories. As a discovery weapon, written depositions are almost valueless. The witness has time to read all of the interrogatories before answering any of them. He has a right to consult with his lawyer as to the phraseology of his answers, and his answers can be, and frequently are, framed in such a manner as to give practically no information. However, written depositions are useful where the witness resides at a place far removed from the forum of the trial. They are likewise useful for proving up formal matters. A written deposition was used by defendant in my Clark case to prove up the mailing to plaintiff of the Disclaimer of Warranty. However, since my talk is devoted to discovery, and since written depositions are not an effective tool of discovery, I will not discuss this rule further.

Rules 26 and 30 have to do with oral depositions. Oral depositions are by far the most widely used of all of the discovery processes, and is the most valuable discovery tool of them all. In my firm, it is standard practice that when we serve our answer to a complaint, at the same time we write to the plaintiff's attorney stating that we are desirous of taking the plaintiff's deposition, and asking when this will be convenient. We have all been brought up on the adage that there are two sides to every question. Actually, in the personal injury field there are probably three sides, namely: the plaintiff's side, the defendant's side, and the right side, which usually is somewhere in between. In this field, it is incumbent upon the competent plaintiff's attorney to find out all that he can about the defendant's side, and it is likewise incumbent upon the defendant to find out all that he can about the plaintiff's side of the case. Because, until you have both sides of the case, you are completely unable intelligently to recommend to your client whether the case is one for settlement or trial.

Of course, in taking the plaintiff's deposition, the defendant's attorney should be very careful to cover all material points. Some years ago, after I had received some criticisms by special investigators to the effect that some of the depositions which had been taken by us had not covered fully some material points that would aid him in his special investigation, I conceived the idea of preparing a check list for the taking of plaintiff's deposition. So, with the assistance of other lawyers, and some good claim men, I prepared such a check list, and it is appended to this talk as "Appendix A". There is nothing unique, technical or brilliant about this check list. However, if this check list is followed chronologically you will have a deposition which is in logical sequence, and furthermore, you will have a fairly complete deposition. I do not have the time here to discuss each of the suggested items for interrogation. However, I have covered this fully in John Alan Appleman's book, "Success-

ful Jury Trials", in which I wrote the chapter on Preparation for Settlement or Trial by the defendant. A similar discussion by me of this check list appears in Vol. VII, No. 1 (Spring, 1954) issue of University of Florida Law Review.

As stated above, in the ordinary automobile accident case, the plaintiff should take the defendant's deposition, and the defendant should take the plaintiff's deposition. Well, who gets to take whose deposition first? Again, this is a matter which is usually handled by agreement among the parties; but where it is not handled by agreement among the parties, then it is a case of first served, first come, and under such decisions as *Colonial Air Lines v. Janas,* 13 F.R.D. 199, the person who is first served with notice to take his deposition must be the first one to come and produce himself for that purpose. Under Rule 26 (a), the defendant can serve notice to take depositions at any time after the commencement of an action, but the plaintiff cannot do so within twenty days after commencement of the action without special leave of the court. Of course, the reason for this is that the plaintiff has had all the time in the world to prepare his case; he has previously employed lawyers and has filed his case to suit his own convenience, whereas, in some cases the defendant's first knowledge of a claim is the filing of a lawsuit against him, and the theory of this rule is that the defendant should have at least twenty days in which to employ counsel and prepare himself. Of course, this does give to the defendant a slight advantage in that the defendant can serve his notice to take depositions first if he is on his toes. However, as can be seen from the discussion later on, this is a matter in which the court has full discretion to enter any order that he sees fit in connection with the taking of depositions and any unfair advantage that either party might gain by serving notices can be controlled by the court. This right to regulate the time and order of taking depositions is now incorporated specifically in an amendment to Rule 30 (a) proposed by the advisory committee. See 16 F.R.D., following page 396.

As to the time and place of taking depositions, they can be taken anywhere and at any time designated in the notice. However, attention is called to the fact that in the case of witnesses who are neither parties nor managing agents of corporate parties, the attendance of the witness must be compelled by subpoena under Rule 45 (d) (2), and in view of the fact that such rule provides that the witness may be required to attend "only in the county wherein he resides" normally the deposition is taken in the county of the residence of the witness.

In the case of parties and managing agents of corporate parties, however, there is an entirely different situation. You do not need to serve a subpoena. Under the cases of *Collins v. Wayland,* 139 Fed. 2d 677, *and Peitzman v. City of Illmo,* 141 Fed. 2d 956, the mere service of the notice to take the deposition, designating the time and the place, is sufficient to require the witness to appear, even without a subpoena, and if the party or the managing agent of the corporate party fails to appear after due notice, then, under Rule 37 (d), this may result in a default judgment or a dismissal with prejudice.

Although no specific length of time is designated in the rules as to how much notice the opposing party must have of the taking of the deposition, it has been held that reasonable notice must be given, and it has been further held that two days time is not a reasonable notice. See *Stover v. Universal,* 11 F.R.D. 90. Furthermore, it has been held improper to give notice to take several depositions in different places at the same time. *Mims v. Central Manufacturers,* 178 Fed. 2d 56.

Usually, a week to ten days notice is sufficient. However, the court, in this connection, can make any order either enlarging or shortening the time, or even designating a different place for the taking of the deposition, under Rule 30 (b), to be discussed later.

If notice is given to take an oral deposition at a distant place, the court can order the payment of attorney's fees and expenses under the federal rules. See *Gibson v. International Freighting,* 173 Fed. 2d 591. In that case, the defendant gave notice to take the deposition of a defense witness at a point far removed from the forum of the trial. The plaintiff offered to take the deposition on written interrogatories, which was rejected by the defendant. The lower court directed the defendant to pay the attorney's fees and expenses of the plaintiff's attorney for attending the taking of this deposition, and this action of the lower court was upheld on appeal under the facts and circumstances of that particular case. This, of course, is with-

in the sound discretion of the trial court. This matter of expense is specifically included in the amendment to Rule 30 (b) now before the Supreme Court. See 16 F.R.D. following page 396.

Rule 26 (b) provides that the witness may be examined on any matter "not privileged". This question of what is and what is not privileged, is one of the very few questions which are troublesome under the federal rules, with their simplicity. Under *Hickman v. Taylor,* 329 U.S. 495, 67 S. Ct. 385, 91 L. Ed. 451, the "work product" of a lawyer is privileged. In other words, the opinions, the memoranda, the conclusions of the lawyer in preparation for trial cannot be reached by the opposition by means of the federal rules of procedure. This prohibition has been made even more explicit in New Jersey under their Rule 4:16-2 and under the Louisiana Statute 3762.

A good discussion of the question of privilege is found in the case of *Zenith Radio v. R.C.A.,* 121 F. Supp. 792. There it is stated:

"There is a privilege only if:
1. the asserted holder of the privilege is or sought to become a client
2. the person to whom the communication was made.
   a) is a member of the bar of a court or his immediate subordinate and
   b) is acting as a lawyer in connection with this communication."

Here, again, on this question of privilege, as in connection with the other discovery rules, much discretion is lodged with the trial judge, and he can control very readily any unwarranted intrusion into a party's private files. A splendid discussion of this matter of privilege which shows that *Hickman v. Taylor* was not speaking of privilege in its ordinary sense, but, in reality, necessity—is found in the case of *Helverson v. Newberry,* 16 F.R.D. 330.

In connection with the taking of a deposition of a witness or a managing agent of a corporate party, the witness need not be named, necessarily, in the notice. In many instances, the plaintiff may not know the name of the managing agent of the defendant in charge of the particular branch of the defendant's activity. He can then serve notice to take the deposition of the managing agent in charge of the particular branch of the defendant's business, and it will be incumbent upon the defendant to produce such managing agent, even though such managing agent is not called by name. A different situation exists, however, where the witness is not a party, nor a managing agent. Here, in order to get a subpoena under Rule 45, the witness must be named. Now, if you have any difficulty in this connection, the only thing that is necessary for you to do is to file written interrogatories under Rule 33, to find out the name of the witness.

Rule 26 (d) provides for the use of depositions, and under such rule the deposition of a party can be used at any time for any purpose, and a deposition of any witness may be used for impeachment at any time. However, the federal courts recognize that it is much better to have the witness on the stand in person than to use the deposition, so, normally, if a witness is available for testimony in person, the court will not permit the use of this witness' deposition, but will require his personal testimony.

Rule 28 designates the persons before whom a deposition may be taken, and such rule specifically prohibits the deposition being taken before an attorney for either of the parties, and this rule has been enlarged, by judicial construction, to include any employee in the office of any attorney. *Gale v. National Transportation Co.,* 7 F.R.D. 237. However, this is a matter which usually is covered by agreement.

Rule 30 (b) provides that the court may make orders for the protection of the parties as follows:

1. That the deposition shall not be taken
2. It may be taken at some designated place other than that stated in the notice
3. It may be taken only on written interrogatories
4. Certain matters shall not be inquired into
5. The scope of the examination shall be limited to certain matters
6. The examination shall be held with no one present except the parties to the action and their officers or counsel
7. That depositions shall be opened only by order of the court
8. Secret processes, etc. need not be disclosed

9. Parties shall simultaneously file specified documents with the court
10. Any other orders which justice requires.

Actually, the tenth one of the above provisions is about all that would be necessary. In other words, if a court may make any order which justice requires, this gives the trial court sufficient latitude to prevent any undue harrassment, and to prevent any unfairness. Recently, I had a case in which opposing counsel gave notice to take the deposition of two very material defense witnesses on written interrogatories at a place nearly one thousand miles from the place of the trial. As I stated earlier written interrogatories are valueless as far as discovery or cross-examination is concerned. I therefore desired at least to cross-examine these witnesses orally, so I went to the books to see whether or not there was any provision for permitting a party, at his own expense, to go to the place where a written deposition is being taken, and there cross-examine the witness orally. In this particuar case, opposing counsel had actually named, as the officer before whom the deposition was to be taken, a man who represented himself in Martindale and various other legal directories, to be the attorney for the client which sought to take the depositions, so I contemplated filing a motion to permit me to cross-examine orally, and I thought that I could probably use to my advantage the fact that opposing counsel had named an attorney for his client as the Notary. Instead of doing this, however, I merely picked up the telephone and called the opposing counsel, and suggested the advisability of both of us going out to the place where this deposition was to be taken, and there take the deposition orally, and with practically no hesitation he agreed to this, so the depositions were taken by agreement orally and before the official court reporter in the federal court in that district. Now, wasn't that much better than to have filed such a motion and called attention to the fact that opposing counsel had violated Rule 28.

One other thing in connection with this, that I believe justifies some comment, is that if a party gives notice to take a deposition, but fails to attend, or fails to have his witness there under a subpoena, he can be required to pay the fee and the expenses of opposing counsel who does attend, pursuant to such notice. See *Detsch v. American Products,* 141 Fed. 2d 662.

Having discussed oral depositions in general, now let us see what can be accomplished from a practical standpoint by the use of this method of discovery.

In my Clark case, we, of course, did not know the chemical content of this hydraulic fluid. We did not know what tests had been made to determine whether or not the fluid actually was suitable for use as a non-flammable hydraulic fluid. These, of course, were material matters. Therefore, just as soon as the defendant removed this case to the federal court, we gave notice to take the deposition of Mr. Bell, and likewise to take the deposition of the person responsible, from a scientific standpoint, of placing Lindol HF-X on the market. We did not know his name; therefore we merely indentified him. The notice stated that the depositions would be taken in New York, which is the Home Office of the defendant, and the residence of the witnesses. Actually, the notice that we gave did not comply with Rule 30 in that we did not state a specific time nor a specific place in New York, since we felt that these were matters that could be agreed upon between counsel.

Shortly thereafter, we received a call from our friendly enemy with the request that he be permitted to take the deposition of Clark before we went to New York to take the deposition of Bell. We called his attention to the fact that we had served our notice first, and that therefore we were entitled to take the deposition first, to all of which he agreed. However, when he seemed to be rather insistent, we told him that since it would not do us any harm and he thought it would do him some good, we would permit him to take Clark's deposition on Friday and the other depositions in New York would be set for the following Wednesday, before Clark's deposition could be transcribed. Clark's deposition, pursuant to this agreement, was taken on the Friday. The following Monday, we obtained our plane tickets, theatre tickets, hotel reservations, and were prepared to leave on Tuesday morning for New York, when, late Monday afternoon, we received a telephone call from a lawyer in the Home Office of Defendant, who very firmly but politely demanded a postponement and stated that they did not have time to prepare for the taking of these depositions. Since our notice did not tech-

nically comply with Rule 30, and since the agreement was not in writing, in compliance with Rule 29, there was nothing we could do except get mad. So I promptly wrote my lawyer friend who had made the agreement with me and told him the whole story. Of course, he resented what his client had done, and stated that he would see to it that I got the depositions as promptly as possible—on even less than a week's notice. We later named another date, which was agreed to, and again I received a call from New York from a lawyer connected with one of the largest law firms there, again demanding a postponement, this time stating that the time set did not suit his convenience, since he was going to be tied up in connection with some other matter. Now there were nearly a hundred lawyers connected with this law firm, so this did not seem to be a very valid excuse, so this time we prepared a motion under Rule 30 (b) asking the court to set the taking of the depositions for some specific place and date. However, before that motion was heard, our lawyer friend here in Texas did make arrangements that the depositions should be taken definitely in New York on a specific date.

Not having been able to go to New York as contemplated, I dropped work on this case and started working on another case which involved the question of indemnity under the New York law, so I went to Volume 14 of the General Digest, which at that time was the last bound volume, and looked under "Indemnity" and there I found a syllabus stating:

> "Under New York law a contract of indemnity is to be strictly construed against the indemnitee. *Lane v. Celanese Corp. of America,* 94 F. Supp. 528."

This was the very point of law that I had under consideration, so I pulled down the book, still thinking of indemnity, and there found the decision to say:

> "On October 18, 1949, two employees of Precision, while in the course of their employment received injuries which resulted in their deaths. The accident was the result of the employees coming in contact with burning hydraulic fluid used by Precision in its business of diecasting at Fayetteville, New York. * * * The burden of the complaints is that Celanese is a manufacturer and distributor of a hydraulic fluid known as Lindol or Lindol HF-X which was intended for use in producing hydraulic pressure in diecasting machines. That Celanese sold and delivered such products to Precision, with the knowledge that the same were intended to be used in its business as above described; that the product was of an inflammable nature; inherently dangerous; and that said manufacturer failed to warn the users of the character of its product and neglected to use the degree of care required in its manufacture and distribuiton."

I had struck oil, and to Hell with Indemnity! I immediately placed a long distance telephone call to Syracuse for the plaintiff's attorneys in that case and was promptly advised that the defendant had paid off many thousands of dollars in settlement of two death cases resulting from that fire. I then asked if any pretrial depositions had been taken, and was told that some four or five hundred pages of depositions had been taken, and he readily agreed to send copies of them to me by Air Express. These depositions included the deposition of Mr. Bell and Mr. Smithson, who was the person responsible, from a scientific standpoint, for releasing Lindol HF-X for the market.

These depositions identified some 150 exhibits, which included reports of all the scientific tests, but since the depositions were never filed in court, the exhibits were not attached.

Thereafter, when I got to New York for the purpose of taking Bell's and Smithson's deposition I was really prepared, but I did not give any indication of this at first. I asked many very innocent questions which would give Mr. Bell the opportunity to tell me about this Precision fire, but he never volunteered the information. They refused to give me the names of any customers, claiming that they were trade secrets and when I got more specific in my questioning, Bell and the defendants New York attorneys, claimed privilege and irrelevance, and I was met with a point-blank refusal to answer questions. At this stage, I then told them that in my brief case was all of the testimony taken in the Lane and Hale cases; that I knew all about the Precision fire; that I was going to amend my complaint and sue them for gross negligence for not warning us specifically against the hazards of continuing

to use this fluid after the Precision fire, and then asked them again to answer the questions. Again they refused. I then stated that I was not going to pursue this matter under Rule 37 (a) which provides that I could go into the district court there in New York for an order compelling an answer, since I was not going to sit around in New York for a matter of weeks waiting to get a hearing on this matter; that I was coming back to the court here in Texas and that I felt the court could order the depositions to be taken in Texas and would do this under the provisions of Rule 30 (b) which permits the court to make any "order which justice requires" under the circumstances.

We therefore, directed the court reporter to prepare a transcript of the New York proceedings as quickly as possible. We then served a notice to continue the taking of the deposition of Mr. Bell here in Texas. The defendant then moved to vacate this notice, but the court ruled that Mr. Bell was a managing agent of the defendant, that the questions that I had asked were perfectly proper; that they were not privileged; they were relevant and did not involve secret trade processes, and he directed that the depositions be continued here in Texas at defendant's costs, since defendant should have answered the questions in New York.

At the same time that I served the notice to continue the taking of the deposition here in Texas, I likewise filed a motion under Rule 34 for the production of all of the 150 exhibits that had been identified in the Lane and the Hale cases, but which had not been introduced in evidence, since these depositions had not been filed.

Rule 34 at present requires a showing of good cause. This is the only discovery rule which requires a showing of "good cause" and there is now before the Supreme Court an amendment which eliminates this requirement of good cause and permits, as a matter of right, a demand for production of documents under Rule 33—Interrogatories to parties. See 16 F. R. D. following page 359. Good cause is, of course, an elastic term and in connection therewith the trial court is vested with much discretion. However, in the case of *Zenith Radio vs. R. C. A.*, 121 F. Supp. 792, the court states:

> "Plaintiff meets F. R. 34's requirement of good cause for production when it shows both the relevance of the documents—all pertain to patents in suit—and the information contained in them is, by their nature, within the exclusive knowledge of the defendants. Their contents were withheld on the depositions of the writers and will remain unknown to plaintiff unless produced. There being legitimate discovery ends to be served, production should be made now of those found neither privileged or 'work product,' and not await trial."

Of course, the exhibits that I was asking for contained information which was solely within the knowledge of the defendant. It contained the tests that they had made of the product, and the court therefore promptly ordered the production of these documents at a time several days in advance of the date set for the re-taking of Mr. Bell's deposition, so that we would have the benefit of a study of these exhibits before we took this deposition.

Under the present rules, Rule 34 is a proper rule for a defendant in a personal injury case to obtain a copy of plaintiff's income tax return and it is no answer that plaintiff does not have a copy if a copy is available to him by application to the Government at small expense, which defendant agrees to pay—and the return is not privileged. See *Tollefsen vs Phillips*, 16 F. R. D. 348.

There are definitely two sides of the question as to whether or not a party should be made to produce documents from his file. In the case of *Morgason vs. B. & M. R.R.*, 16 F.R.D. 200, the railroad had previously taken a statement from the person who subsequently sued them for personal injuries. The plaintiff moved to require the railroad to produce this statement for examining and copying. In denying this motion, Judge Aldrich said:

> "The adoption of the Civil Procedure Rules was not a denial of the concept that the court is the forum and the trial the procedure best calculated to uncover the truth. The enthusiasm which greeted the discovery provisions of the Rules when carried, as it has been, to the extent here advocated, that 'the truth should be known before the trial, and nobody be surprised', seems calculated, however, to weaken the efficacy of ordinary trial procedure. There is a

vast difference between surprise and unfair surprise. The one is as beneficial as the other is harmful. Not merely may too many rehearsals, in the form of too much discovery, take the bloom off the opening night, but this absence of freshness may make the performance sterile. A certain amount of surprise is often the catalyst which precipitates the truth. Alternatively, it may serve as a medium by which the court or jury may gauge the accuracy of the account."

"If every witness consistently told the truth, and none cut his cloth to the wind, little possible harm and much good might come from maximum pretrial disclosure. Experience indicates, however, that there are facile witnesses whose interest in 'knowing the truth before trial' is prompted primarily by a desire to find the most plausible way to defeat the truth. For this, and other reasons, I believe the requirement of good cause for compulsory pretrial production should mean more than mere relevancy and competency, or ordinary desirability from the standpoint of the movant, and should be something in the nature of special circumstances. *Alltmont vs. United States,* 3 Cir., 177 F.2d 971, certiorari denied 339 U. S. 967, 70 S.Ct. 999, 94 L.Ed, 1375; *Safeway Stores vs. Reynolds,* 85 U.S. App. D.C. 194, 176 F.2d 476."

It would seem to me that Judge Aldrich was correct in his ruling. If the plaintiff previously told the truth in his statement, and was willing to tell the truth at the trial, he need have no fears as to being confronted with a prior conflicting statement. On the other hand, it seems obvious that what the plaintiff was trying to do was to obtain this statement so that he would know just exactly what the statement contained so that he could astutely try to get around the truth. Such was likewise the holding in *Helverson vs. Newberry,* 16 F.R.D. 330, where the statement was in question and answer form so that the age-old cry that an unscrupulous claim agent had put words in the witness' mouth and left out important matters could not properly be made.

On the other hand, Judge Holtzhoff, in the District of Columbia, in an article in 15 F.R.D. 155 at page 167, says:

"One of the questions that is sometimes confronted is whether in a negligence action a statement obtained by the defendant's representative from the plaintiff should be subject to inspection by plaintiff's counsel. It would seem that as a matter of fairness a party's lawyer should be entitled to see any statement that his client has signed."

It would seem to me that this is not a particularly practical approach to the question. However, if the amendment to Rule 33 now before the Supreme Court is adopted, such statements may be obtained as a matter of right and without any showing of good cause and the burden is thereby cast on the opponent to obtain a court order that it not be produced. 16 F.R.D. following page 396. I personally oppose this change.

As stated above, the trial court has wide discretion in requiring the production of documents, and since his order requiring the production of documents, is not a final order, but an interlocutory order, said order is not appealable. See *O'Malley vs. Chrysler Corporation,* 160 F.2d 35. In the case of *Detsch vs. American,* 141 F.2d 662, an order requiring payment of $151.30 as attorney's fees and expenses was affirmed on appeal but the Court of Appeals for the Ninth Circuit did not discuss its jurisdiction.

Furthermore, a writ of prohibition in the Court of Appeals will not lie, even for an abuse of discretion. See *In re: Illinois Central Railroad Company,* 192 F.2d 465. Therefore, the only way that such an interlocutory order by a trial court could be attacked would be by the method used in *Hickman vs. Taylor,* supra. There, the trial court ordered the production of the documents. Mr. Fortenbaugh, the attorney for the defendant thereupon offered himself up as a human sacrifice and respectfully declined to obey the order of the court. The court held him in contempt of court and he appealed the contempt ruling. I, personally, think that Mr. Fortenbaugh should be commended for his zeal, but I, for one, would hesitate running the risk of those three days in jail just in order to keep my client from having to produce some written document, particularly when he will probably have to produce it anyway, ultimately.

In connection with this matter of good cause, it is interesting to note that although Rule 34 specifically requires a showing of good cause for the production

of documents, Rule 45, having to do with the issuance of subpoenas duces tecum, does not require the showing of good cause in limine. However, in the case of *Demeulanaere vs. Rockwell,* 13 F.R.D. 134, *North* vs. *Lehigh,* 10 F.R.D. 38, and the *State Theatres Case,* 11 F.R.D. 382, the requirement of good cause in Rule 34, has been read into Rule 45 by the courts, the difference being, however, that under Rule 34 the movant is required to show in the beginning that he has good cause for his motion, whereas, under Rule 45, he goes ahead and gets his subpoena duces tecum requiring the production of the documents, and then the burden is upon the opposite party to come in and raise the question of good cause. This will be the effect of the amendments now before the court if they are adopted — — in other words, under the amended rules, demand for production can be made as a matter of right and the burden of procuring an order from the court is shifted from the proponent to the opponent.

According to Rule 34, the documents desired to be produced must be "designated." In the case of *Sheffield Corp. vs. Alger,* 16 F.R.D. 27, a demand was made for "all material reports, statements, technical data and references to the improper packaging of plaintiff's machinery, as referred to in paragraph V of the Answer." The court there stated:

> "This is a typical example of what the court considers to be an improper statement, whether used in the form of an interrogatory under Rule 33, 28 U.S.C.A., or a request for the submission of documents for inspection under Rule 34."

Properly, the document should be so designated that the opposite party can, without trouble, go to his file and pick out the documents desired. *Hillside vs. Warner,* 7 F.R.D. 260. If you do not know what documents *are* in existence, then the proper course of procedure would be to go in under Rule 30 and take depositions to find out what documents are in existence, or to propound interrogatories to parties under Rule 33, and thereby obtain the same information.

Rule 33: Interrogatories to parties. This rule is used chiefly to obtain simple facts to narrow the issues by obtaining admissions from an adverse party and to obtain information to make use of other discovery procedure, such as the designation of documents, the names of the witnesses, and what experts have been consulted. Under the proposed amendments, Rule 33 is expanded so as to include specifically the listing of the names of witnesses expected to be used on the trial. In the case of *Newsum vs. Pennsylvania Railway,* 97 F. Supp. 500, this was done under the present Rule 33, and when defendant did not list two very vital witnesses, the trial judge refused to permit these witnesses to testify—much to the defendant's damage.

Rule 33 has not been used broadly, but because it is less expensive than taking the deposition, it can be used by plaintiff to prove up such formal matters as ownership of the vehicle; whether the driver was an employee; whether acting in the course of his employment at the time of the accident, and matters of that sort, which could likewise be proved up by Demand for Admissions.

In the case of *Hickman vs. Taylor,* interrogatories to parties were used to demand the production of documents. The Supreme Court held that this was improper and that the wrong rule had been followed, and that Rule 34 was the rule under which the plaintiff should have demanded these statements. However, the Supreme Court went on and handed down its decision, just as if Rule 34 had been the one that had been followed in that instance. As heretofore pointed out, under the proposed amendments, documents may be demanded under Rule 33 as was done initially in *Hickman vs. Taylor.*

Rule 35: Physical and Mental Examinations. Although not used in my Clark case, since no personal injuries were involved, the next rule logically to be discussed is Rule 35, which provides for a physical and mental examination. When this rule was first promulgated, there was a great hue and cry set up about the invasion of the privacy of the person, and about personal privilege. However, these cries were subdued by the Supreme Court of the United States in the case of *Sibbach vs. Wilson,* 321 U.S. 1, which upheld the validity of this rule, and it is now very widely used; and I might say it does make for justice. In connection with this rule, good cause must be shown before the court will order a physical or mental examination of the party, and it goes without

saying that if the defendant has had its doctors examine or treat the plaintiff, as is the case so often in a Workmen's Compensation case, the court will not, as a general rule, grant additional medical examination, and here again, the court has wide discretion.

Under this rule, if the defendant does get a medical examination, the plaintiff can demand a copy of the report of such examination, but if the plaintiff does demand a copy of such report, then the plaintiff is obligated to furnish to the defendant copies of all of its medical reports. Strangely, there is no such requirement that if the defendant demands all of the plaintiff's medical reports, then the plaintiff can demand all of the defendant's medical reports, so that apparently what is sauce for the defendant, in this instance, is not sauce for the plaintiff. This has been met in Louisiana by its Section 3783, which does require the defendant, under such circumstances, to furnish copies of all of its medical reports to the plaintiff, which, of course, is only justice, and I feel sure that under the broad powers of the trial court, the trial court could order the production of these reports in the federal court, regardless of the silence of this particular rule on the subject. This apparent defect is likewise to be remedied if the amendment is to be adopted. Furthermore, under the proposed amendment the rule is broadened so as to include blood tests in paternity cases, and to permit examination of agents under the control of a party. This fills a void found to exist in *Kell vs. Denver Transfer Co.* (not reported for publication) where it was held the plaintiff could not obtain an examination of defendant's bus driver even though it was contended that he was color blind.

In this connection, the court is not required to designate any particular physician to make the examination; it is discretionary with the court as to whether or not he will accept or appoint a physician suggested by one of the parties, or whether he himself shall select the physician. See *Gitto vs. Societa Anonima,* 27 F.Supp. 785, and *Cline vs. Yellow Cab,* 7 F.R.D. 169.

So, now, back to the practical application of these discovery rules to my Clark case. As stated before, the court sustained the motion for the production of documents under Rule 34, and ordered them produced well in advance of the taking of the deposition of Mr. Bell here in Texas. These exhibits proved to be somewhat embarrassing to the defendant, because in these exhibits were found statements by Mr. Bell to the effect that "we were skeptical and exceedingly cautious in the promotion of Lindol HF-X". What was also shown by the exhibits was that Defendant had taken Tricresyl Phosphate, which was a relatively flame resistant material, and because it was in short supply, and because it was expensive, it had diluted this fluid with approrimately 50% of ordinary petroleum oil, which, of course, is relatively quite flammable.

Testimony was developed that actually this Lindol HF-X had been sold to only about five customers. Clark was the first. Precision was next. Cleveland Hardware & Forging Company was next. Paragon Die Casting Company in Chicago was next; and Schultz Die Casting Company in Toledo was the fifth. It will be recalled that on October 18th, the day of the fire at Precision, Clark recevied a telegram about necessarily withdrawing Lindol HF-X from the market, etc., which gave no hint that the fluid was dangerous. We were anxious to know whether or not additional warnings were given to these other customers, but when we interrogated Mr. Bell on this subject he persisted in stating that he sent the other customers the same character of warning that he sent to Clark, and he would not admit that he remembered having given other warnings to them in addition to this vague telegram.

We then had Clark get on long distance telephone and talk to each of the other four users, and each of them rather hesitantly stated that they had received either a personal visit or a telephone call shortly after the fire at Precision, in which they were told of such fire. We thereupon filed a demand for admissions under Rule 36, demanding that Defendant admit that each of the other four users of this product had been warned either in person or by telephone, and had been instructed to immediately get this Lindol HF-X out of their hydraulic lines, which they had done. At the same time that we filed the Demand for Admissions, we advised Defendant as to what these other customers had stated in their telephone conversation with us, and we called attention to the provision of Rule 37 (c) which requires a party who refused to admit certain facts to pay the costs, expenses and attorney's fees of a par-

ty in proving up these facts, if the facts ultimately are proven up, and at the same time we served notices to take the depositions in Syracuse, Toledo, Cleveland, and Chicago, of the persons who would testify to these additional warnings. We did not believe that written interrogatories would have been satisfactory, because all of these people were still customers of and very friendly to the defendant. The admissions made by defendant in response to these demands were sufficient to avoid the necessity of the various depositions.

Rule 36: Demand for Admissions. Under this rule, either party may demand of the other party admissions of certain facts, and a failure to so admit constitutes an admission. An excellent example of the use of demand for admissions is found in the case of *Walsh vs. Connecticut Mutual,* 26 F.Supp. 566. That was a decision in January of 1939, when the rules only went into effect in September, 1938, so you can see that the attorneys in that case were on their toes, and ready to use this new machinery which had been provided for them. The suit there was on a double indemnity life insurance policy, and the demands asked that the plaintiff admit that the plaintiff's decedent was an alcoholic; admit that he had had other treatments by doctors; and other various misrepresentations which would avoid the policy.

Although Judge Holtzhoff, in an article which he wrote and which appears in 15 F.R.D. at 155, says that this rule is not used as much as it might be, since the only penalty is making the party pay the costs of proving up the matters demanded, this is not exactly so. As is pointed out in the Walsh case, failure to answer can constitute an admission of facts, which will entitle a party to a summary judgment.

Such a motion was filed in Shreveport, Louisiana, in the case of *Rogers vs. Hartford Accident,* 94 F.Supp. 499. There, the plaintiff sued General Gas and its insurer, Hartford, for damages resulting from an explosion of butane gas, one of the items of negligence being that the gas did not contain the statutory malodorant. General Gas thereupon impleaded the furnisher to it of the gas, Sunray, and Sunray's insurer, Pacific Indemnity Company. Pacific Indemnity Company filed a certified copy of its policy, which afforded coverage only for "gases shipped in tank cars", and stated the gas in question was not shipped in tank cars but by truck. It filed its Demand for Admissions, which were answered to the effect that the gas was delivered by truck.

It would seem to me that this is a perfect case for summary judgment, because here, under the admissions and under the policy, there was no coverage by Pacific Indemnity Company, and Pacific should not have been required to stay in the case and defend long, drawn-out litigation if there was actually no coverage. However, Judge Dawkins disagreed, and, as I understand it, the case was thereafter disposed of by way of settlement. However, this rule has been used in connection with motions for summary judgment, in the case of *Lorenzo Nursery vs. Western Car Loading,* 91 F. Supp. 553, *U.S. vs. Adelmann,* 10 F.R.D. 417, and *Woods vs. Whelan,* 93 F.Supp. 401.

Rule 56: Summary Judgments. In connection with Rule 36, I mentioned the matter of summary judgments. This is an excellent rule, and altho not a discovery rule itself furnishes the goal toward which discovery leads and can be used to eliminate issues which in reality are not in the case. Summary judgments may be granted in favor of or against all or any part of a claim or a defense, where there is no genuine fact issue in connection therewith. A motion for summary judgment may be made on the pleadings on depositions and on affidavits and counter-affidavits. Even where both sides file a motion for summary judgment, if the court finds that there are actually fact issues, then both motions should be overruled. *U.S. vs. Haynes,* 102 F.Supp. 843. See also note in 36 A.L.R. (2) 881. However, the fact that both sides do file a motion for summary judgment is a good indication that there are no real fact questions involved. Furthermore, where defendant only files a motion for summary judgment, if it appears that actually plaintiff is entitled to such a judgment, the court will render judgment in favor of plaintiff. *American Auto vs. Ind. Ins. Co.,* 108 F.Supp. 221. This is specifically provided for in the amendment now before the court.

Rule 16: Pretrial Hearings. In my opinion, Rule 16 is logically out of place. It should follow the discovery rules as it does in New Jersey, and when used in connection with the discovery rules and motion for summary judgment, it is most

effective in the speedy administration of justice.

There is nothing particularly unique about a pretrial hearing. It was originated by Judge Ira Jaynes of Detroit in the early 1920's and by means of it the congested dockets of Detroit were brought more up to date. Shortly thereafter, they were adopted as standard procedure in Boston and in other places over the country, and their use was so effective that when the Federal Rules went into effect in 1938, pretrials were provided for, but only on a discretionary basis. However, many courts, such as the District of Columbia, have made the rule mandatory, and Judge Bolitha Laws, Chief Judge of the District of Columbia, is one of the outstanding advocates of this pretrial procedure, and he has gone all over the country giving pretrial demonstrations. It has been my pleasure to work as a member of Judge Laws' team in giving such a pretrial demonstration, and it was remarkable what was accomplished in that particular case. A typewriter was brought in, and the court reporter, instead of taking down notes, received dictation from the trial judge direct to his typewrtier, as the proceeding went forward, and by this means the stipulations could be signed at the time of the hearing. Photographs, climatological data, x-rays, plats, and other exhibits which were to be used upon the trial of the case, were all identified to avoid the delay of proving them up on the actual trial. The issues were fully discussed, and in particular case that I had before Judge Laws, it was brought out that the plaintiff had in mind an erroneous theory of the measure of damages, and when Judge Laws called that to the plaintiff's attention and actually got out a pencil and paper to figure what the plaintiff could collect if he prevailed, it was shown that the defendant railroad had offered in settlement nearly two-thirds of this amount; and the question of liability was a very serious question in the case, so that it resulted in a compromise of that particular lawsuit.

New Jersey has improved upon Rule 16, and under the New Jersey rule, N.J.R.R. 4:29, (1) pretrial hearings are mandatory; (2) attorneys must try to agree between themselves to eliminate disputes; (3) attorneys must make full report in writing of such effort to the court, with a full statement of their contentions; (4) hearings must be held in open court and taken down directly on the typewriter; and (5) pretrial orders supersede all pleadings inconsistent therewith. In the amendment to Rule 16 now before the Supreme Court no drastic changes are proposed. Under the amendment, however, the court can require the disclosure of the identity of witnesses expected to be called at the trial by both sides. This, of course, is in line with the general idea of full disclosure.

It has been my experience, however, that the success or failure of pretrial hearings depends upon the judge before whom such hearings are had and this judge himself must be sold upon their efficacy. If all pretrial hearings were conducted as the one in which I participated before Judge Bolitha Laws, much could be accomplished, but I have seen other pretrial hearings completely fail to accomplish anything.

Now, back to my case and the practical application of the summary judgment rule in connection with pretrial hearings. It will be recalled that one of the defendant's defenses in this case was the so-called disclaimer of warranty. All of the facts bearing on this issue were in the form of written communications. We therefore attached copies of all of the written communications to a motion for summary judgment as against this defense, contending that a completed contract had already been made at the time this disclaimer of warranty was mailed, without cover letter, to the plaintiff. By depositions, it was shown that it was never seen by the plaintiff, and therefore never assented to by it, and in view of the fact that there were no fact questions involved, the court sustained this motion for summary judgment, and struck that defense.

Another defense that had been urged was an absence of necessary parties, namely, the insurance companies, which were subrogated to the extent of some $80,000 in the total claim. We filed a motion for summary judgment as against this defense, as well, attaching to such motion the loan receipt agreement, together with the affidavit of all of the parties that were involved, setting forth the circumstances under which the insurance monies were paid, with the understanding that at some later date all of the rights of the respective parties would be settled by agreement, which was done in the form of this loan receipt. This issue

was therefore passed upon at pretrial hearings before the case ever went to trial, and it was held that the fact of insurance should not be brought out before the jury even though the court did order them made technical parties.

The defendant likewise filed motions for summary judgment on the issues of negligence, contributory negligence and gross negligence, but the trial court, at a pretrial hearing, stated that these were questions of fact for a jury. As a result of the discovery and the pretrial procedures used in this Celanese case, all of the exhibits were proved up well in advance of trial; the law questions were gotten out of the way, so that only the real issues were actually tried. The taking of testimony on the trial of the case consumed only four days, whereas had it not been for the discovery and pretrial procedures, this case could actually have taken weeks to try. At the conclusion of such trial, we were pleased to be able to report to our various clients that there were no surprises in the case whatsoever; that all of the evidence in the case was in line with the previous evidence given in depositions, and I might say that each side had, in the form of depositions, the evidence of all of the material facts in the case.

I am a great believer in these federal discovery rules. I think they make for justice, and in closing I would like to quote Judge Holtzhoff of the District of Columbia, in his article which appears in 15 Federal Rules Decisions at page 174, as follows:

> "And so—after fifteen years, a judge looks at the Rules and finds them being competently and brilliantly used, liberally construed, their clarity, succinctness, and simplicity vindicated, their text adopted in whole or in part by many of the States, and achieving their mission beyond the most buoyant expectations of the Committee who framed them. A new procedure must be outstanding to be cherished so soon by the legal profession, which in the past has had the reputation of being unwilling to follow new paths and which was said to cling to the legal maze with great persistence. Indeed, the eminent Committee may proudly quote from an older and greater book, that it can justly look at its work and find it good."

CHECK LIST IN TAKING PLAINTIFF'S DEPOSITION

This is not intended to be all-inclusive. Each case, of course, requires an interrogation indicated largely by the investigation file, but this is intended to give pointers that are sometimes overlooked.

(1) Ask the (1) name, (2) social security number, (3) and exact age of the witness, (4) and whether he has ever gone under any other name, (5) or different spelling of the same name.

(2) General history of the witness, including (1) where he was born, (2) all places where he has lived, (3) names and location of (a) father, (b) mother, (c) brothers and (d) sisters.

(3) Marital history—(1) whether he is married or divorced, (2) and if divorced how many times, (3) how many children, (4) where former spouse or spouses can be located, (5) their maiden and present name, (6) and where divorce was granted and (7) where marriage took place.

(4) Whether or not any statements were made at the time of the accident or any admissions were made by any of the parties to the accident.

(5) (1) Description of the accident, letting witness first describe it in narrative form, (2) and then questioning him specifically; (3) names and addresses of all eye witnesses.

(6) What occurred immediately after the accident; whether claimant went to the hospital and, if so, how.

(7) Names and addresses of all doctors who treated him subsequent to the accident.

(8) Names and addresses of all doctors who have treated him prior to the accident. He should identify his "family doctor", if he has one.

(9) Have witness sign authorization in the following form: "All doctors who have treated me and all hospitals in which I have ever been a patient are hereby authorized to give to the bearer hereof or of any photostatic copy hereof all information relative to my

physical condition, past, present or future." This should be dated and signed by the witness and witnessed by his attorney.

(10) Ask if claimant is willing to submit to a medical examination by doctors of defendant's selection.

(11) Ask witness whether he or any member of his family, as far as he knows, has ever had a claim for personal injury against any person, firm, corporation or governmental agency, and follow this up, depending upon the answer of the witness.

(12) (1)Ask the witness whether he has ever had any previous accidents or injuries of any character, (2) any subsequent accidents or injuries to this one, (3) does he have any health and accident insurance paying money for prior injuries or the injury made the basis of this suit; (4) is he receiving any government benefits for disability, unemployment, etc.

(13) (1) Determine the nature of previous jobs; (2) how much he was making, (3) for whom he was working; (4) why employment was terminated; (5) what qualifications and experience the witness had for the type of work he was doing when injured; (6) and ask what income tax he paid, with copy of return; (7) inquire as to what work witness has done since accident, and describe just what his duties are or were; (8) determine his employers and earnings with particular care for the year preceding his injury.

(14) (1) Definitely determine what part or parts of the witness' body were injured and eliminate all other portions; (2) if there is any particular member of the body injured, have him state what he can or cannot do with that particular member; (4) Go into detail as to what witness can and cannot do. This becomes important when movies are used.

(15) (1) Ask for his status during the last war; (2) where his draft board was, and (3) if he was turned down, why; (4) Obtain a signed authorization permitting bearer to review his army records and examine his records at any Veterans' Administration hospital.

(16) Inquire whether witness has ever been arrested, indicted or convicted of felony or crime, offense or misdemeanor and whether or not he has ever been in jail or prison. Geographically locate where the offenses occurred.

(17) Explain to plaintiff that the purpose of the deposition is to bring out all the relevant facts from the plaintiff's standpoint and then ask: "Is there any other fact relevant to this matter about which I have not asked but which might have a bearing on this case?"

In Trust and Commission Clause

(Memo dated April 23, 1953)

L. B. BOGART, *Secretary*
Aetna Insurance Group, Hartford, Connecticut

I WROTE the attached article in April 1946 raising the question of whether from the standpoint of the assured the inclusion of coverage on property of others in the same policy item with the assured's own goods was a liability or asset but our Underwriting Department could arouse little interest on the part of the form makers in the matter at that time. Since then there have been several interesting developments and possibly the point has now been reached when something can be accomplished.

We are interested in a suit pending in the Federal Courts in Texas arising out of the Texas City disaster and our assured is the Texas City Railway Terminal Corporation. The litigation was made necessary primarily because the assured carried separate fire and explosion policies with different companies and agreement could not be reached on the proper segregation of the loss from the respective causes. However, after the assured had filed suit against both sets of insurers, customers of the assured and their insurers acting under subrogation proceeded to become parties to the suit by interpleader claiming a right to participate in the policy proceeds because of alleged coverage afforded them under the Trust and Commission Clause included in the form. The verbiage used was "property of others for which the assured *may be liable*" and, as pointed out in my April 1946 article, admittedly under the decided cases they have a good cause of action irrespective of negligence on the part of the assured. However, the values at risk of customer's goods on storage in the terminal warehouse ran into the millions even though the over-all loss to such property ran to only a small fraction of this value. For example, the United States Government had a large quantity of tin on storage worth $10,000,000 or $12,000,000 and yet it was salvaged with no loss. Obviously if the total value of all customer's goods at risk were to enter into the computation of co-insurance, the assureds would recover but a small proporition of the loss they have sustained on their own property. Accordingly, they are taking the position in this litigation that they did not ask the insurers to provide coverage on property of others under a Trust and Commission Clause or otherwise, did not know that this clause was in the form until after the loss had occurred and they now request the court to strike it out on the grounds of mutual mistake. This litigation has not yet come to trial because of the pending subrogation suits against the Government and it was hoped that a full recovery from that source would eliminate any need for trying out he complicated issues of the suit against the fire and explosion carriers. I have always hoped that this case might be tried, though, because publicity might then be given to the assured's position on the Trust and Commission Clause and thus the attention of the form makers would be focused on the penalty our present practice of automatically including property of others coverage along with the assured's own goods imposes upon our policyholder. There is still a good chance the case may be tried even if the Supreme Court upholds the position of the insurance companies under subrogation against the Government as the settlements following such a decision would probably not be in full so that on this claim the assured would still be left with a substantial loss deficit warranting trial of the issues.

Another development since 1946 is the litigation in which we are presently involved in North Carolina where a policy was written covering blanket on real and personal property for a theater chain and some of the theaters were owned outright and others were leased by our assured. The blanket item included the verbiage of the Trust and Commission Clause and merely referred to "property of others" rather than being restricted to *personal* property only. Following a serious fire loss to a theater leased by the assured and with probable negligence on the assured's part in respect to the origin of the fire, the building insurers under subrogation brought suit against our assured as leasee alleging legal liability for the loss and we in turn were asked to defend the case and pay any judgment obtained because of our "prop-

erty of others" coverage. We took the position with the assured that the Trust and Commission Clause was intended to apply only to personal property despite the fact that we insure only under the one blanket item but that if we were to be forced to defend the case and pay any judgment against the assured, then the full value of all real property leased or owned by the assured would necessarily be at risk under our contract and the co-insurance clause would have to be applied on that basis. Naturally this would mean that the assured would be a very heavy co-insurer on any loss so sustained as well as penalized by co-insurance application on the original adjustment involving the assured's own contents of the building where the loss occurred. Realization by the assureds of the penalties thus entailed has caused them to enter into agreement with us to defend the claim with their own attorneys but with our counsel assisting and without prejudice to the rights of either party. It is understood that when the amount of the judgment secured, if any, is known, the entire situation will be reviewed and agreement reached as to whether the property of others coverage will be invoked by the assured subject to full co-insurance application or the judgment and legal expense will be paid by the assured without looking to us for reimbursement. Again, this case illustrates the complexities that arise by our present loose treatment of the Trust and Commission Clause.

Finally, we now have before us the recent decision handed down by the United States Court of Appeals for the Fifth Circuit in the case of *Globe and Rutgers Fire Insurance Company vs. The United States of America.* In this litigation, the Government was not named in the Globe and Rutgers policy but brought suit directly in their own name against the custodians' insurers under the coverage allegedly afforded them by the Trust and Commission Clause. The verbiage employed here was "property of others . . . provided the assured is legally liable therefor." The court gave the same interpretation to this wording as had previously been accorded "for which the assured *may* be liable" on the grounds that it constitutes direct property coverage rather than legal liability protection to the assured. To better understand the Appellate Court's reasoning I quote the following from the decision:

"In applying the policy provisions the trial court properly gave great weight to the fact that the entire tenor and effect of the contracts was insurance against property loss by fire and not insurance only against the legal liability of the named insured for the fire loss. The policies provide property insurance—not indemnity or liability insurance. Whether the described commodities were owned by the insured, or "held in trust or on consignment or for storage", in either and all events it is provided that the policy shall cover "property". It was likewise correctly determined by the trial court that the phrase "provided the insured is legally liable therefor," when considered in connection with these policy provisions providing insurance on property, should be considered to refer to the present and existing liability of the custodian generally and not restricted to liability which was the consequence alone of a fire . . . Furthermore, as remarked by the trial Court, the argument overlooks the frequent tendency of bailees to attempt contractual stipulations against their common law liability."

In other words, if this decision is to be generally followed the picture has been changed from that outlined in my article written in 1946 as we are now no better off whether the phrase *"may* be liable" or "provided the assured *is* legally liable" is used.

As I view the picture, the courts are showing an increasing tendency to make a distinction only as between a direct coverage on described property on the one hand and coverage on the assured's legal liability for such property on the other. In other words, until our forms are restricted to legal liability rather than covering *property* for which the assured is liable, we are going to find ourselves forced to permit third parties' recovery with only the protection of co-insurance application against the assureds' and customers' claims combined.

It seems to me that this can only be done by employing language akin to that cited in the next to the last paragraph of my 1946 article where I suggested the phraseology:

"On the interest of the insured in, including liability imposed by law for, similar personal property, belonging in whole or in part to others and held by the insured either in trust or on commission, sold but not removed, on storage or

for repairs, or otherwise held."

While I believe this language would be strong enough to restrict coverage to the assured's actual legal liability for customers' goods it still would only partially solve the problem as long as the form makers continue to include "property of others" coverage in the same item with the assured's own property. It has become more important than ever for the assured's own protection and to prevent burdening him with co-insurance penalties which he had never visualized that the coverage be segregated under separate items so that the assured may carry at his own volition a stated amount of insurance on customers' goods subject to separate co-insurance application and he can also decide whether he wishes direct coverage on the property for the benefit of his customers or have it restricted to his legal liability under the verbiage I have suggested above. This should be the assured's own decision and I feel very strongly that we are doing an injustice and impairing our public relations as long as we continue to automatically include coverage available directly for the protection of others without the assured's knowledge and consent while at the same time opening up the distinct possibility that our policyholder will thereby be seriously penalized.

Trust and Commission Clause—Liability or Asset?

L. B. Bogart

(Article dated April, 1946)

IN these days of ever broadening coverage, the insuring public is apt to believe that all additional coverage granted in the form is to their advantage and an asset that can be accepted without question. However, the reaction is not so pleasant when a loss occurs and the supposed benefit becomes a serious liability. And, while the coverage afforded on the property of others, under the most commonly used forms of the Trust and Commission Clause, is usually accepted as an asset by the insured, the manner in which it operates in the event of a loss is not only grossly misunderstood by the insuring public but by many well informed insurance men as well.

Suppose we take an actual loss situation to illustrate what can happen. John Doe operates a small furrier store in New York and usually has stock on hand of fur coats not exceeding $10,000 in value. He requests his local agent to issue a $9,000 policy covering his stock, including the 90% Co-insurance Clause, and he makes no mention that he desires any coverage on customers' fur coats that he may be holding on storage or for repairs. Since he includes in his customer's receipt the statement "not responsible for loss by fire or theft" he feels no obligation to take out insurance on customers' goods at his own expense. However, when the policy has been written up and delivered to him by his agent, the following verbiage appears in the form:

> "This policy covers property as described both of the assured or of others held in trust or on commission or on consignment, or sold but not removed, or held in or on joint account with others, or held on storage, or otherwise held for which the assured may be liable."

Undoubtedly the assured considers he has taken out a policy in an amount sufficient to fully cover any loss he may sustain up to $9,000 and that his only concern would be in the event of a loss where the damage to his own goods exceeded the amount of his policy, but he is content to take that risk. Even if John Doe actually read the fine print in the form which we have quoted (and we know how rarely this happens), he would not understand the import of this phraseology. After taking out insurance in his own name and at his own expense he merely regards it as his own and to deal with as he sees fit.

And, then a loss occurs damaging, let us say, $5,000 worth of the assured's stock of fur coats. There is also a $4,000 loss on customers' garments which he has been holding either on storage or for repairs, the total value of which is determined to be $20,000 and now, for the first time, the assured is made aware of two surprising facts: (1) Direct coverage has been afforded on customers' goods under his policy and this coverage is not contingent

upon the assured being actually legally liable to the customers or upon any negligence on his part under the circumstances surrounding the loss. The courts have construed the phrase "may be liable" to mean that coverage is afforded whenever the assured is holding customers' goods under such conditions that he *might* be liable under some circumstances, not that he be actually legally liable under the facts of the particular loss. In other words, in the usual bailment situation, the bailee is required to exercise such care over the bailee's goods that a reasonably prudent person would exercise in the same or similar circumstances. If the bailee fails to do so, he is considered negligent and ordinarily is legally liable despite any stipulations in his contract with the bailor. But, when the phrase "may be liable" is used in reference to coverage on property of others in an insurance policy, the mere fact that the assured would have been liable if he *had* been negligent is all that is necessary to establish coverage irrespective of whether such negligence actually existed at the time of loss. As a result it most universally goes that customers' goods are covered while on a bailee's premises whenever this phraseology is employed.

A recent decision on this point is the Illinois case (*Home Insurance Company vs. Peoria Railway*) but the rule laid down by the court interpreting the phrase "may be liable" has been generally followed in other jurisdictions. In the course of its opinion the court has the following to say:

> "Nor is the right of recovery limited to such cars as it should be made to appear by evidence the appellee company was absolutely legally liable to account and pay for to the owner thereof. The proper construction of the policy in this respect is that all feright cars consumed by fire while on the line of the appellee's road and in its care and custody, with respect to which it had some duty to perform of such nature that it might be charged with legal liability to account to the owner thereof, or to be subjected to claims and demands to so account, and to possible litigation growing out of such claims and demands, were protected by the policy. The contention that the word 'liable' means an absolute legal and fixed liability is not tenable. In Webster's dictionary the word 'liable' is said to refer to a future, possible or probable happening which may not occur, and the same lexicographer further defines the word as follows: 'Exposed to a certain contingency or casualty, more or less probable.' The word as used in the policy does not signify a perfected or fixed legal liability, but rather a condition out of which a legal liability may arise."

As a side light, and to illustrate the general misconception of the import of this phrase even among the insurance fraternity, we quote a paragraph from the bulletin recently issued by the Insurance Executive Association on discussing the revised recommended dwelling and contents form:

> "The phrase 'or for which the insured may be liable' has been inserted into the main paragraph under Item 2 in response to suggestions received from agents and interested regional organizations with the purpose of making it clear to the layman that in the event the insured is liable for goods belonging to others, the coverage under the form is extended to protect him against loss to such property. Although, it is recognized that this particular phrase may well be unnecessary in those locations where the 1943 New York policy is in effect, such phraseology is felt to be advisable in other areas and, in addition, it is felt that the phrase will make the intent of the coverage in this respect perfectly clear to the layman and, therefore, will make unnecessary many questions that have arisen in the past."

(2) When such coverage exists for the customers' benefit, it can be asserted by the bailor, whether the assured consents or not, that he is entitled to pro rata share of all the proceeds of the policy even though the insurance is insufficient to cover the asured's own loss. The attitude of the courts in this respect is indicated in the leading case of *Utica Canning Company vs. Home Insurance Company* and a brief review of that case will clarify the legal reasoning employed:

The Home policy covered "the property of the assured, or held by them in trust or on commission, or sold but not removed." Following the fire, the assured settled his claim with the Home and did not include

damage to customers' goods as he was not legally liable therefor and did not intend that they be insured under his policy. The owner of the goods sued the insurer direct even though the insured under the contract refused to be a party to the litigation having already given the insurer a complete release of all claims under the contract. The Court held that the Home was liable to the owner of the goods and stated in the course of the decision,

> "This form of policy (on goods in trust or on commission) is similar in its legal effect to the policy for whom it may concern, and it arises in much the same way. The insurance is taken out by an agent, consignee, or third party, and inures to the benefit of the real owner of the goods, who need not have given original authority therefor, nor need he adopt the policy prior to a loss; but an adoption within a reasonable time after the loss is sufficient to bind the insurer. * * * A policy on goods held in trust or on commission will cover all the goods with which the party procuring the policy is intrusted, and is not confined to goods held in trust in the strict technical sense, but extends to ordinary bailments. Nor does the policy apply simply to the personal interest of the one who takes out the insurance, but to the whole value of the goods."

Numerous decisions might be cited which uphold the bailor's right to share the entire proceeds of the policy, among them:

Boyd vs. McKee 99 *Va.* 72
Snow vs. Carr 61 *Alabama* 363
Siter vs. Morrs 13 *Penna. State* 220
Southern Cold Storage Co. vs. Dechman (*Texas*) 73 S.W. 545

Returning to the John Doe case, what is the resulting loss adjustment when this disconcerting information is made known to him, and claims are pressed by his customers on his policy? Actually the loss figures would develop as follows:

Sound Value		
Assured's Stock	$10,000	
Customers' Goods	20,000	
Total Sound Value		$30,000
Insurance Required	(90%)	27,000
Insurance Carried		9,000

Loss		
Assured's Stock	5,000	
Customers' Stock	4,000	9,000

Insurance Pays

9,000 (insurance carried) x 9,000=$3,000
27,000 (insurance required)

Assured Receives

5,000 (assured's loss) x 3,000=$1,667
9,000 (Total loss)

Customer Receives

4,000 (Customers' Loss) x 3,000=$1,333
9,000 (Total loss)

We find the assured then the loser to the extent of $3,333 or 67% of his loss because of coverage incurred in his policy that he did not ask for, did not want, and did not know was there until the loss occurred.

But it might be argued that the case we have used for an illustration is an extreme, and that in actual practice few such situations would be presented. On the contrary, the broad coverage afforded to third parties under our contract is becoming more and more generally known to the legal fraternity and claims of this type are presented with increasing frequency to the detriment of our insureds.

We might cite numerous recent cases, such as a canning factory in New York State where the Government presented for their own merchandise and collected under a general coverage contract. Even though the assured had not reported the value of the Government merchandise, had no intention of insuring it, but was unnecessarily penalized on his own claim under the full reporting clause; the jewelry store in Oklahoma where $1900 worth of customers' goods was destroyed in addition to the insured's own merchandise and claims were presented even though the insured was already a heavy co-insurer on his own loss; and the textile print works at Passaic, New Jersey, where it was found after the loss that the assured had $300,000 worth of customers' goods on hand as against $59,000 of his own merchandise and only $36,000 insurance to pay a loss of $60,000.

In all these cases and many others, the assured was the innocent victim of a loosely worded Trust and Commission Clause and it is not difficult to imagine the antagonism that developed against the insurer because of the use of such a clause without any explanation in advance of the

loss as to the loss to be suffered by the assured.

Despite the fact that this situation is steadily becoming more serious, it is not a matter of recent origin. Thirty years ago, William J. Greer, speaking on the subject of Trust and Commission Clause before the Insurance Society of New York, told of the pitfalls of the phraseology "may be liable" and stated in part:

"The time is not only coming, but has arrived, when in the interest of both the assured and the Companies, there should be some reasonable and definite limit upon this form of contract. Its scope is controlled, as we have seen, by the intent of the bailee, but in scarcely one case in a hundred can the bailee tell you what his intent was, because he had none. Probably he learns for the first time, after the fire, that there is such a thing as the Commission Clause, much less that he has one on his own policies, and where the assured gives the matter any thought at all, he undoubtedly understands and believes the clause is to protect him only in case he shall be liable. In the great majority of cases, that is all the assured intends to cover; it is all he wants or needs and all he ever supposed he had, and when he comes to understand the situation, it will be all he will be willing to take. It is no longer any compliment to the assured, or a safe or wise thing to bestow upon him an unqualified form of commission clause, unless there is some occasion for it."

As a result of the interest on the subject at that time, the New York Exchange adopted a revised Trust and Commission Clause with coverage limited on "property owned by the assured and on said insured's interest in and legal liability for property held in trust or on commission," et cetera. Clearly this new wording made coverage on customers' goods contingent upon the establishment of actual legal liability on the part of the assured and was a step in the right direction. But, unfortunately, brokers' forms using the phraseology "may be liable" are in general use even in New York Exchange territory, and in most other sections of the country the old phraseology has never been revised. Even the Standard IUB form contains the following insuring clause:

"On goods, wares and merchandise . . . the property of the assured or held in trust, or on consignment, or for which the asured may be liable in the event of loss or damage."

It would seem, therefore, that the AEtna could well do some pioneering on this subject, pointing out to the various Forms Committees and leading brokers, the disadvantages from the insured's standpoint of the Trust and Commission Clause as now drawn, and working aggressively for reformation. The first, and by far the best step we could take would be to strive for the elimination of coverage on property of others under the items insuring the assured's own stock of merchandise, giving him the option of taking out additional insurance under a separate item on his legal liability for property of others in his possession. Then the assured would not be the innocent victim in the case of a loss but could take out whatever amount of insurance either on his own stock or customers' goods that he felt his particular needs might require. Should a loss occur his own indemnity under the contract would not be jeopardized and the customers' claims would be dealt with separately. Furthermore, it would very much simplify the determination of the amount of insurance necessary for compliance with the Trust and Commission Clause and if the assured elects to carry insufficient insurance on customers' goods or his own, he will at least be doing so with his eyes open and upon his own responsibility.

Secondly, if legal liability on customers' goods is to be covered under a separate item, consideration should be given to a differential in rate depending on whether the assured, through his contracts with his customers, accepts or denies such liability. Without doubt the exposure to the insurer is less when the assured has made every attempt to avoid legal liability to customers in the event of loss, and this should be reflected in the rate. As a matter of fact, policies are now written on this basis in a few jurisdictions.

Lastly, we believe we should endeavor to have the troublesome phrase "may be liable" eliminated from all forms insuring property of others and the words "liability imposed by law" substituted in their place. As a suggestion, the following phraseology may well be employed: "On the interest of the insured in, including

liability imposed by law for, similar personal property belonging in whole or in part to others and held by the insured either in trust or on commission, sold but not removed, on storage or for repairs, or otherwise held".

When we consider the stress laid on public relations today, we believe such a move on the part of the Company would meet with widespread support from the insurance fraternity as a whole once the pitfalls of the present phraseology employed in the Trust and Commission Clause were made apparent.

Declaratory Judgments in the Field of Casualty Insurance

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TWENTY years have now elapsed since the appearance of Professor Borchard's famous work on Declaratory Judgments. Although this method of procedure was not new even in 1934, Borchard's study successfully brought it to the attention of many lawyers who hitherto had failed to see its advantages in the determination of all sorts of legal controversy. It was pointed out by Borchard that this device was particularly well suited to problems arising in the field of casualty insurance and he predicted that the greatest interest in its use would be found in that category. While it is true that many insurance coverage problems have been decided in this manner, it is also unfortunately true that the full potential of this remedy has never been realized, even though procedure for declaratory relief is now available in nearly all state jurisdictions as well as in the Federal courts.

Most of the statutes creating this remedy are similar to the Uniform Declaratory Judgments Act which specifically states that the act should be liberally construed and administered.[1] Although the courts have not been uniformly eager to interpret their statutes with liberality, fortunately, in the field of casualty insurance coverage, courts have approved the use of this remedy more often than not. It would seem therefore that the hesitancy to use this device has been due not so much to the inate conservatism of the courts as to the reluctance of insurance carriers and their counsel to initiate litigation rather than defend it.

For example in the two years following January 1952, of twenty-four cases involving Declaratory Judgments appearing in the New York State Reports, only two were concerned with casualty insurance coverage. Of the remaining twenty-two cases, a third were held by the Court to be not properly in the field calling for declaratory relief.

It has been frequently pointed out that the advantages of pre-determining insurance coverage is particularly obvious in the field of casualty insurance.[2] This self-evident advantage exists because it permits the insurance carrier to retain control of a liability claim, but at the same time to obtain a decision on a disputed question of coverage. If the insurance carrier moves with dispatch, this question may be determined well in advance of a trial of the accident claim and in many jurisdictions an injunction against proceeding with the trial of an injury claim may even be obtained.[3]

There are four categories of problems where Declaratory relief may be sought involving liability insurance coverage. These problems involve:

1. Validity of the policy. That is, a determination of whether the insured obtained the policy by fraud, misrepresentation or mutual mistake of fact.
2. Extent of coverage. That is, the determination of whether the provisions of the policy are applicable to the loss. In automobile cases this frequently involves the question of permissive use of the vehicle.
3. Sharing of coverage liability. That is, whether there is another insurance policy which is primary or excess on the risk.
4. Refusal to cover a specific loss, be-

[1] Uniform Declaratory Judgments Act No. 12.

[2] *Travelers Insurance Co. vs. Young* 18 F. Supp. 450.

[3] *American Fidelity Co. vs. Hotel Poultney* 118 Vt. 136, 102 ATL. (2nd) 322.
Indemnity Insurance Company of North America vs. Murphy 128 NYS 2nd 422; 205 Misc. 332.

cause of breach of condition in the policy.

It will be observed that in all situations set forth above, there are other remedies available. The insurance carrier may elect to await an action for money damage for breach of its insurance contract. It may itself commence an action to rescind its contract or reform its policy. The carrier may attempt to intervene in a personal injury action and in some jurisdictions an insured claimant may sue the insurance carrier directly.[4] The issue however, is not whether other remedies are available, but whether the remedy of Declaratory Judgment is more economical and will result in a speedier determination of the legal question involved.[5]

Shortly after Borchard wrote his authoritative book, an article appeared in the Yale Law Journal which has predicted some of the difficulties encountered by counsel in bringing actions for Declaratory Judgments. The author of the article said:

> "In view of the suspicion with which the declaration is sometimes regarded, it is possible that by a dual process of refusing to issue declarations in unfamiliar situations, because it is said that no controversy exists, and in similar situations, because traditional remedies are available, the Courts may steadily curtail the use of the declaration". (36 Yale Law Journal 299)

Examples of this reluctance to use a new and liberal method of procedure may be found at times in nearly every jurisdiction. Typical of the reaction of some courts when presented with an application for declaratory relief in insurance cases is that found in a recent Pennsylvania decision,[6] where the sister of an assured fell at the home of the assured in Pennsylvania, but failed to bring in an action in that state within the Statute of Limitations. Subsequently, an action was brought in New York State where the sister resided. There was some reason to believe that the assured cooperated with the claimant to permit service of a Summons personally in New York State. The insurance carrier brought an action in Pennsylvania for a Declaratory Judgment that the policy of insurance did not cover the risk because the assured had failed to notify the company promptly of the accident and had failed to cooperate with it in its investigation and defense of the claim. Exercising its discretion, the court denied the application and said:

> "We are not unaware of the fact that greater latitude prevails, perhaps, in some other jurisdictions in entertaining declaratory judgment proceedings, but the general trend of our own decisions has been markedly to the contrary."

Fortunately, the position taken by the Pennsylvania Courts is the minority view and more and more state courts are approving the device of Declaratory Judgment as a means of predetermining insurance coverage. This is particularly so where there is a question of validity of the insurance policy, where the assured may have obtained a policy of insurance through fraud, misrepresentation or where there has been a mutual mistake in applying for coverage. The frequency with which applications appear in recent reports covering these issues is marked.

The problem of determining the validity of a policy where it was issued in response to an application, either oral or written, has plagued insurance companies for many years. Although precedents had been set in the field of life and accident insurance, these cases were of little value to the casualty companies since the determination in the life and accident cases occurred in suits brought directly against the companies. Without the remedy of Declaratory Judgments, there were no appropriate remedies available to liability carriers except actions to rescind or reform their policies. For various reasons insurance companies have always been reluctant to use these remedies.

Several interesting cases have appeared in recent reports indicating that insurance companies will be granted relief, where the insured has obtained his policy through a misrepresentation of fact. In one of these, the Allstate Insurance Company required the applicant to answer a written questionnaire before the policy was issued. One of the questions involved the driving habits not only of the insured, but of the insured's family. After an accident where the insured's husband was operating the vehicle, it appeared that while the insured herself had an excellent record, the husband had

[4]Wisconsin; Louisiana.

[5]*Travelers Indemnity Insurance Co. vs. Bourg* 253 A.D.43 (N.Y.); 1 N.Y. Supp. 2nd 172.

[6]*Eureka Casualty Co. vs. Henderson* 371 Pa., 587; 92 ATL 2nd 551.

received forty-one traffic tickets in a ten year period, including nine tickets in one year, with one suspension of license and a revocation of license occurring two years before the policy was issued. The court held that declaratory judgment was the proper remedy and in its judgment found that the policy was void from its inception.[7]

In another recent decision, a policy was held null and void where the insured, in applying for coverage stated that he was twenty-five years of age when in fact, he was only twenty years old.[8]

Although most problems of validity of the policy will occur in determining whether the assured has in good faith disclosed the facts which the insurance carrier believes necessary to issue its policy, there may be situations involving coverage due to a mutual mistake of fact. In one case, the policy described a father and a son as the owners of an automobile, and both as the named insureds in the policy. After an accident, the assured brought an action for declaratory judgment in effect to reform the policy so that only the father would be the named insured. It was held that the remedy was proper, but the facts as established on trial did not support the plaintiff's contention.[9] The courts however, apparently have not been uniform in permitting by declaratory judgment, a reformation of the insurance policy. In a recent Pennsylvania case for example, the court refused to grant a declaratory judgment that an assured should have been named in the policy. It was said that reformation was the only remedy available to the insurance company.[10]

Until recently, the question most often considered in suits for declaration of insurance coverage was that involved with the permissive use of the insured vehicle. Since the issue of whether the insured permitted the driver to operate the car is also an issue to be decided in the liability action, the courts have shown no uniformity either in permitting or refusing the remedy. In Florida, an application was refused where the only question involved was whether the car was driven with knowledge and consent of the insured.[11] On the other hand, Georgia approved the use of a Declaratory Judgment to determine the same issue.[12] In the cases where coverage depends on permissive use of the insured vehicle, there is no question of coverage to the named insured. The only questions are whether there is an additional insured and whether the accident is covered under the policy, if the operator did not have permission from the owner to drive the car at the time of the accident.

A similar situation has been presented to the courts where a policy excludes injury to an employee. Generally, the courts have permitted the insurance company to determine its coverage by a declaration prior to the conclusion of the injury action.[13] A recent New York case illustrates an unfortunate experience of an insurance company, where no action was brought for Declaratory Judgment with this policy defense available.[14] An assured residing in New York State undertook, with the assistance of the claimant, to procure costumes from Canada to be used in a winter festival in upper New York State. While driving in the Province of Ontario, which had a guest statute, an accident occurred injuring the claimant. An action was brought in New York State which followed the Ontario law.

The Court charged the jury, in effect, that a verdict could be returned for the claimant only if he were an employee of the assured. The insurance company had realized this problem and advised the insured that if a verdict were recovered on this basis no coverage was furnished in its policy to an employee, and accordingly there would be no payment in the event of a recovery by the claimant. After the verdict was returned in favor of the claimant, on the theory that he was an employee, an action was brought directly against the insurance company. In the second action, the insurance company proved the employee exclusion in its policy, and that this rela-

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[7] *Allstate Insurance Company vs. Orloff*, 106 F. Supp. 114 (Mich. 1952).

[8] *State Farm Mutual A.P.I. Co. vs. Massey*, 195 Fed. 2nd 56.

[9] *Purcell vs. Metropolitan Casualty Company of New York*, 260 S.W. 2nd 134.

[10] *Baskind vs. National Surety Corp.*, 376 Pa. 13; 101 Atl. 2nd 645.

[11] *Columbia Casualty Co. vs. Zimmerman, (Fla.)* 62 So. 2nd 338.

[12] *Drake vs. General Accident Fire & Life Assurance Co.*, 88 Ga. 408; 77 SE 2nd 71.

[13] *State Farm Mutual Insurance Co. v. Cardwell*, 252 Ala. 682; 36 So. 2nd 75.
Inland Mutual Insurance Co. vs. Eastern Motor Lines; 119 F. Supp. 344.
Reed vs. Fidelity & Casualty Insurance Company of New York, 254 Ala. 473; 48 So. 2nd 773.

[14] *Jewtraw vs. Hartford A & I Co.*, 284 AD 312. (N.Y.)

tionship was the basis for the verdict in the original injury action. Nevertheless, the Court in the second action, permitted the claimant to allege and prove that he was not an employee, and a verdict was returned in his behalf against the company.

The determination of which of two or more insurance carriers is responsible for the loss, has been the occasion for several interesting suits. In one California action,[15] two carriers wrote policies of liability insurance on Chrysler Motors. No agreement could be reached as to which of the carriers was responsible for a loss and accordingly, the assured proceeded with the defense of the action and during the course of trial, settled the claim. At the time of settlement, the two insurance carriers agreed that one or the other was responsible and reimbursed the assured by equal payments but reserved their rights against each other. The problem they then commenced was finally resolved by an action for Declaratory Judgment.

The fourth category of cases which have found this remedy ideal are those involving a breach of a condition by the insured. Generally, these are concerned with a delayed notice or a failure on the part of the insured to cooperate with the carrier in the investigation and defense of a claim. Were it not for a pre-determination of coverage, the insurance company ordinarily has little choice but to proceed and defend the insured on the merits, or to disclaim entirely and thus lose control of the litigation. Even a non-waiver agreement can assist the company little, since if it proceeds with such an agreement, it is difficult later on to convince a court that it has been prejudiced by the actions of its insured.

Because it is so hard to decide whether an assured has prejudiced the carrier when he has neglected to notify it of the accident or because it appears that he is cooperating with the claimant, it is in this field of coverage determination that the Declaratory Judgment has found its widest acceptance. Except for a few ultra-conservative jurisdictions, the courts have generally granted declaratory relief to the insurance carrier where this problem has arisen. An exception is the State of Pennsylvania where in a recent case the court refused to entertain an application for declaratory relief where it was alleged that the insured refused to give a statement and advised the claimant, a relative, to do likewise. It was also alleged that the insured failed to notify the carrier promptly upon the service of a Summons. The insurance carrier in applying for declaratory relief stated that there was a good defense on the merits to the injury action. The court refused to grant Declaratory Judgment and said that if the insurance carrier were correct in its position there was no liability, and there would be no necessity for any determination of coverage.[16]

The majority of courts both Federal and State have held that Declaratory Judgment is the proper remedy, and in many instances have held for the insurance carrier, on the question of a failure to cooperate or a delayed notice, and have relieved the insurance carrier from its obligation to defend or pay.[17]

Besides knowing in advance of the trial of the liability action whether there will be insurance coverage, in many cases the insurance carrier may obtain an injunction staying the trial of the liability action pending the decision for declaratory relief. This procedure, however, is available only where the liability action and the action to determine insurance coverage are brought in the same jurisdiction. If one action has been brought in a State Court and the other in a Federal jurisdiction, no injunctive relief is available.

Before the injunction will be granted, however, the courts uniformly demand that the insurance carrier prove that it has moved with dispatch. In an Alabama case, the accident occurred in November of 1946. The liability action was brought in April of 1947, but the action for Declaratory Judgment delayed until March of 1948. It was held that no injunction would be permitted because of the delay in seeking declaratory relief.[18] To the same effect is another Alabama action where the accident occurred January 26, 1952, the liability action was instituted in September of

[15] *Chrysler Motors vs. Royal Indemnity Co.*, 76 CA 2nd 785; 174 P. 2nd 318.

[16] *Eureka Casualty Co. vs. Henderson* 371 Pa. 587; 92 Atl. 2nd 551.

[17] *Knapp v. Hankins* 106 F. Supp. 43 (Ill. 1952)
Providence Washington Indemnity Co. v. Edes 109 F. Supp. 813 (Maine 1953)
Standard Accident Insurance Company vs. Cochardo —Misc— (N.Y. 1954)
American Fidelity Co. v. Hotel Poultney, 118 Vt. 136; 102 Atl. 2nd 322.
State Farm Mutual vs. Sharpton 259 Ala. 386; 66 So. 2nd 915.

[18] *State Farm Mutual Insurance Co. v. Cardwell* 250 Ala. 282; 36 So. 2nd 75.

the same year, but action for Declaratory Judgment was delayed until February of 1953.[19]

If the insurance carrier believes that injunctive relief is desirable, it would be well advised to commence its action for Declaratory Judgment as soon as it has information in its hands indicating that a policy defense is available to it. If the carrier seriously intends to rely upon a policy defense, it should commence its action even before the injured claimants have done so. It is possible under those circumstances to obtain an injunction even before the injury actions are started. Although, of course, this will force the injured persons to retain counsel sooner, perhaps, than they would otherwise do. Merely because the liability actions are not pending, however, will not prevent an injunction being ordered to stay their prosecution.[20]

In spite of the few conservative jurisdictions, it is impossible to avoid the conclusion that the general trend is toward a more liberal use of declaratory relief to determine insurance coverage. Because of its many advantages, and because the insurance carrier has nothing to lose by determining any question of coverage by this means, it is apparent that in the future, there will be more of this type of litigation for the insurance counsel than there has in the past. The only deterent to its use is the natural reluctance of the local claim adjuster or his examiner to commence litigation rather than awaiting the first move from the claimant's attorneys. It is suggested, therefore, that the claims departments advise their adjusters and examiners that whenever there appears to be any question of coverage, particularly where it arises through a breach of condition by the insured, that local counsel be promptly advised so that an action for declaratory relief can be started.

[19]*State Farm Mutual Insurance Co. v. Sharpton* 259 Ala. 386; 66 So. 2nd 915.

[20]*Indemnity Insurance Co. of North America vs. Murphy* 305 Misc, 332; 128 N.Y. Supp. 2nd 424 (N.Y.)

Standard Accident Insurance Company v. Cochardo —Misc.— (N.Y. 1954).

Nuisance Value Settlements—A Necessary Evil?

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It is a well known fact that a good many negligence actions are settled by the insurance companies for what is commonly called "nuisance value." Another term less offensive to the sensitive ears of plaintiffs' lawyers is "cost of defense." Why are there so many of these settlements? Are nuisance value settlements increasing or decreasing? Should this practice be eliminated?

This discussion will be limited to claims in litigation which are obviously non-liability or liability without any damages. No doubt many claims that are settled without a lawsuit ever being filed also fall into this category.

Wherever there is a completed trial of an action, usually the defendant or the plaintiff is dissatisfied. One thing that can be said for a settled case is that both sides are generally reasonably satisfied, otherwise a settlement could never have been reached between the parties.

From the standpoint of the insurance carrier first—since it usually is the source of the "balm" which the plaintiff is seeking. A few days before the scheduled trial date, the plaintiff's lawyer calls the adjuster for a final settlement discussion (in some jurisdictions the plaintiff's lawyer deals only with the defendant's lawyer, who in turn consults the insurance company representative). The plaintiff's demand suddenly drops from $10,000.00, or $5,000.00, or $3,500.00 to $750.00. The adjuster may have previously offered $150.00. The adjuster tells the plaintiff's lawyer that the defense lawyer estimates a three- or four-day trial and, with the cost of bringing witnesses into court, including medical testimony, the adjuster determines the "cost of defense" may approximate $350.00 and, therefore, he is willing to offer this amount to the plaintiff's lawyer. The plaintiff's lawyer accepts. The case is settled. The prayer for damages in the complaint may have been for $100,000.00; the original demand for settlement may have been $25,000.00. Why the nominal settlement?

The insurance companies make nuisance

value settlements primarily because they are "in business." By making a payment of $350.00 for a non-liability case, they are guaranteed a closed file. Even if the case went to trial and their assured's non-liability was adjudicated, nevertheless the attorney's fees and costs of witnesses, lay and expert, would exceed the settlement. Also, it is generally the defense which carries the jury, with its attendant daily expense. Although jury expense and other legal court costs are awarded the defendant, how often are they collectible from an indigent plaintiff?

There is another compelling reason why insurance companies make nuisance value settlements—that is the ever present fear of what a sympathetic jury might do even in a non-liability case. In other words, the case might be lost for a variety of reasons, resulting in a judgment considerably in excess of a nuisance value settlement. Therefore, there is present the risk of "exposure" to greater liability.

Therefore, there is an argument in favor of the practice of insurance companies making nuisance value settlements based on "good business practice."

But doesn't this practice increase the cost to the ultimate consumer—the fellow who pays the premium to the insurance company on his insurance policy? There can be no question about it. Anything that increases the cost of doing business will increase the cost to the insured. The knowledge that insurance companies will pay nuisance value on all claims increases the number of claims, both litigated and non-litigated. It is generally recognized that the nuisance value of a litigated claim is worth more than the nuisance value of a non-litigated claim. This knowledge, in turn, causes more claims and lawsuits to be filed, thus resulting in more overhead expense, filing fees for answers, depositions, medical examinations, attorneys' fees, and further time and expense in making more extensive investigation of the claim and claimant.

Now from the standpoint of the plaintiff's attorney—why does he make a nuisance value settlement of a case?

Roughly, it can be said that nuisance value cases fall into two general groups: First, a great majority of these cases are filed for what they actually are—nuisance value—nothing more, nothing less. Secondly, where the attorney honestly believes his claim is meritorious but, through failure to make a thorough investigation of the facts, or a lack of understanding of the applicability of certain law to the facts which he may have, he pursues his claim into a lawsuit and, generally on the eve of the trial, he discovers, perhaps after the taking of depositions or through the necessity of making an investigation to prepare for trial, or through legal research, that he doesn't have a case. Another reason may be that he realizes there is a failure of proof through the absence of a key witness which he had depended upon to prove his claim on liability; or there may be a failure of medical proof to substantiate his claim of injury.

The second group of cases does not reflect on the character and integrity of the lawyer, but only on his ability. The first group of cases reflects on the character and integrity of the lawyer. Some lawyers who fall in the first group have quite frankly stated that they make their living by filing nuisance value cases. They justify, if "justify" is the proper word for it, their actions by saying they are doing a service for their clients. In many such cases the client may have a small medical bill of around $100.00 or less, and maybe a week's loss of earnings of approximately $50.00, or a total of $150.00 out of pocket expenses, which the claimant can ill afford, even though the accident or mishap which caused his injury was his own fault. So when the plaintiff's lawyer obtains a settlement of $350.00, retaining one-third usually as attorney's fees, the claimant is "reimbursed" his out of pocket expenses and gets a few dollars "spending money."

The plaintiff's lawyer who handles nuisance value cases is secure in the knowledge that he can always settle for nuisance value and thereby salvage any money he has advanced for cost of investigation, filing fees, etc. He is in the position of having everything to gain and nothing to lose. One of the cases which he believes to be a nuisance value case may be settled for a lot more money than he expcted to receive simply because the insurance company's investigation developed a possible theory of liability upon their assured which was overlooked by the plaintiff's attorney, or the defense loses its key witness, or the defendant's medical examination revealed more extensive injury than was even suspected or claimed. This may be one type of case that the insurance company settles for much less than the case was

actually worth due to the oversight of plaintiff's attorney or poor investigation. Sometimes the plaintiff's lawyer may discover the true value of a case and negotiate a commensurate compromise settlement. Another probability in his favor also is that, if his client refuses to take a nuisance value settlement and the attorney is forced into trial, a large verdict may be awarded his client through the sympathy or generosity of a jury or the failure of the jury to comprehend the law applicable to the facts of the case.

Therefore, one result of the insurance companies' practice of paying nuisance value cases is to encourage the filing of non-meritorious claims. The more that is paid for nuisance value cases, the more attractive they become to plaintiffs' lawyers. One plaintiff's lawyer convinced the adjuster for an insurance company that it would take almost two weeks to try his particular case and consequently was able to negotiate a $1000.00 nuisance value settlement, based on "cost of defense." Naturally, since most insurance companies now pay nuisance value cases, the number is generally increasing. The effect of this practice is to condone "getting something for nothing," which economic theory seems to be on the increase throughout the United States. It foreshadows the breakdown of the normal strength of the American people and it is a long way from the American feeling expressed by Robert Harper when he said, "Millions for defense but not one cent for tribute." Can the insurance companies continue this practice of paying nuisance value settlements on the theory that it is good business to do so without dire results being occasioned in the long run?

It is suggested that it would be better for all concerned that the practice of nuisance value settlements be abolished. It would take a concerted effort on the part of insurance companies to combat this first group of nuisance value cases. It is quite easy for an adjuster or claims supervisor to justify such payment and he is seldom criticized for so doing. However, in order to curb this "growing parasite" of an action, it will take claims men who can say "no" intelligently, together with the full support of their supervisors and policy-making personnel of their companies. It will also take more critical evaluation of these cases to eliminate an oversight in failing to pay a legitimate claim on the mistaken theory that it is a nuisance value case, because by refusing to make a settlement a trial may be forced which may result in a large judgment. Careless evaluation of a claim or an adamant refusal to pay any amount on any case must be avoided.

One result of a careful appraisal and resultant refusal to pay nuisance value cases would be to gradually eliminate this type of case. It would take some education of the plaintiffs' lawyers so they would know that they cannot expect to get paid on a nuisance value case. It would take quite a few defendants' verdicts and a strenuous effort to collect the court costs, plus the immediate filing of abstracts of judgments, to educate the plaintiffs' lawyers. Plaintiffs' lawyers do not like to spend their time processing a claim, trying a lawsuit, and ending up possibly in debt for the expenses advanced, particularly when they know they cannot collect their own out of pocket expenses from their own clients.

One might reasonably inquire why should a trial lawyer seek to eliminate nuisance value cases—isn't he taking fees away from himself? Wouldn't he lose the fee for preparing answers, taking depositions, etc.? Undoubtedly, that would be one result. But on the other hand, most trial lawyers' calendars are filled with cases set for trial which will never go to trial because at the last moment they will be settled for a nuisance value. How does this affect him? A good trial lawyer prepares all of his cases and it often takes more time on his part to prepare a "good" case than a "bad" one. Many times he gets ready on a nuisance value case and he confers with other plaintiffs' counsel who have cases following the so-called nuisance value case relative to continuances of their following cases. He perhaps spends several days in preparing for a case which is never tried. Generally he does not get paid for the time spent in preparing those cases—he doesn't get any per diem pay where the case is settled before going to trial. A common situation is that he announces ready for the trial of a nuisance value case, notifies counsel on succeeding trials that he will be engaged in trial, and their cases will have to be continued, but on the day of trial the nuisance value is paid and the case is placed off calendar. This results in a defense lawyer being available to try other cases but is unable to do so because the succeeding cases have been con-

tinued or the succeeding plaintiffs' lawyers have made other arrangements, so the defense lawyer may be unable to go to trial for another week. Invariably, the inclusion of a number of nuisance value cases on a trial calendar reduces the number of "per diems" which might have been available otherwise to the defense lawyer through the trial of legitimate and meritorious lawsuits.

However, a greater end, regardless of any possible loss of attorney fees to the defense lawyer, regardless of any possible loss of fees paid to the plaintiffs' lawyers as part of a nuisance value settlement, regardless of the savings of the assureds' premium dollars, is the fact that honor and integrity will return to dignify the trial of a lawsuit. Jurors will have more respect for a plaintiff's lawyer who fights for a meritorious cause. In fact, the elimination of the nuisance value claim or case should be one of the goals of plaintiffs' lawyers associations. It would probably have more effect towards achieving a "more adequate award" than a dozen conventions or seminars teaching plaintiffs' lawyers "demonstrative evidence."

Use of the Special Verdict in Negligence Cases

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MEMBERS of the jury, two forms of verdict will be furnished you. The one which finds for the plaintiff will require you to insert the amount you find the plaintiff should recover. The other which finds for the defendant need only be signed by nine or more of your number. With words such as these from the court a negligence case nears its end. Before, however, the court in his charge to the jury has carefully discussed the issues involved. He has defined negligence and contributory negligence. He has explained proximate cause as distinguished from remote cause. He has pointed out the use of presumptions and inferences. He has read the applicable statutes and ordinances and shown how a violation of some, but not of others, may be negligence per se. He has told them as to certain issues where the burden of proof lay. He has lectured on the tests of credibility of witnesses and probably pointed out the value of expert evidence. In short, he has crowded into about an hour's discussion, a flood of legal principles and concepts; technical terms and phrases; abstruse and complex propositions, concerning all of which lawyers spend a lifetime of study. The laymen who compose the jury, with two forms of general verdicts in hand, file out of the court room to commence their deliberations.

What happens when they reach their jury room? It is anybody's and everybody's guess! Often bewildered by the newness and strangeness of this procedure, with which they are coming to grips for the first time, is it any wonder that there are many times when they want to take the easy way out?

In one case tried in a midwestern state the very first words spoken by a juror were: "How much will we give her (the plaintiff)?" In another the suggestion was immediately made that each juror write an amount on a piece of paper, and that these figures be added and then divided by twelve. When you consider the complexity of the legal picture drawn, together with the emotional and psychological factors present in every jury trial, it is a great wonder that these laymen do as well as they do.

The use of the general verdict, in many cases, permits them to side-step and avoid a careful analysis of the facts and a determination, issue by issue, of the ultimate problems presented. By the general verdict a jury enters its final declaration as to the truth of the matter submitted and at issue between the parties.[1] This declaration goes to matters of both law and fact.

The special verdict, on the other hand, is a determination by the jury, in lieu of a general verdict, of those ultimate and material facts covering the issues to which the

[1] *Fidelity & Cas. Co. v. Huse & Carleton*, 272 Mass. 448, 172 N.E. 590.

court adds legal conclusions and renders the required judgment.[2]

In most of our American States the right to a special verdict has been confirmed by statute. However, even in the absence of statute it has been said that the right of a jury to render a special verdict goes back to the early common law.[3] In Texas special verdicts—there known as special issues—are the rule rather than the exception. In some of the states it is discretionary with the court to submit a special verdict to the jury. In others, such as Ohio, Indiana, and Wisconsin upon timely request it is a matter of absolute right.[4] In the Federal Courts the power to require a jury to render a special verdict is vested in the sound discretion of the court.[5]

A special verdict may take the form of a narrative statement of the material facts bearing on the disputed issues. On the other hand, it may take a question and answer form, and one court in a leading case said: "We can see no vital objection to the use of the interrogatory form of special verdict, and are of the opinion that in some respects it has advantages over the narrative form to accomplish the purpose of the statute making provision for a special verdict."[6]

Where a special verdict is employed, in drafting it certain fundamentals must be constantly kept in mind. It must, in order to be good, contain findings of fact on all of the material facts or issues essential to support a judgment. The court must be able to take it and the pleadings—without looking to the evidence—and find ultimate facts in the verdict, covering all disputed issues, whereon to bottom the final judgment.[7] As a distinguished author on the subject put it: "The special verdict is the sole basis of judgment. It finds the facts only, leaving it for the court to apply the law thereto, and is never properly rendered with a general verdict. It must be complete and consistent in and within itself, without aider by intendment or reference to the evidence. If it does not find all the facts essential to sustain (or defeat, as the case may be) the cause of action, it will not support a judgment ***."[8]

The jury need not, however, specifically find facts about which there is no dispute, or such facts, for example, as may be admitted in the pleadings.[9] The jury should not find conclusions of law. Furthermore, evidential matters which merely support the ultimate facts should not be recited. Only those *operative facts* which settle the issues between the parties should be included.

Where conclusions of law, or evidential matter, are found in a special verdict it is not necessarily thereby rendered invalid, if the ultimate facts found, disregarding the conclusions and the evidence, are sufficient to support a judgment. As stated in one leading case: "The jury are the exclusive judges of the facts, but they should be required to return as their conclusions from the evidence the ultimate facts in the case and not a recital of the evidence. However, the inclusion of evidence supporting facts found in a special verdict will not render it defective if ultimate facts are found which warrant a judgment. Nor are conclusions of law proper in a special verdict, and they must be disregarded just as are evidentiary matter. They do not destroy the effect of ultimate facts found, and if those are sufficient to sustain a judgment the special verdict should stand."[10]

Conclusions of law never supply the place of findings of ultimate facts. In the case of a special verdict they are particularly objectionable for the reason that the jury is not charged generally on the principles of law applicable to the issues. Thus, presumably, the jury have no knowledge concerning the legal principles involved. In a negligence case, for example, they would not be told the legal rule for deter-

[2] *Dowd-Feder Co. v. Schreyer,* 124 O.S. 504, 179 N.E. 411.
Davis v. Chicago R. Co. 93 Wis. 470, 7 N.W. 16; Ann: 24 L.R.A. (N.S) 1, 5. 76 A.L.R. 1137.

[3] *Walker v. New Mexico & S. P. Ry. Co.* 165 U.S. 593, 41 L.Ed. 837, 17 S.Ct. 421;
Underwood v. People, 32 Mich. 1, 20 Am. Rep. 633;
Life Ins. Co. v. Robertson (1927) 6 Tenn. App. 43.

[4] *Noseda v. Delmul,* 123 O.S. 647; 176 N.E. 571, 76 A.L.R. 1133.
Udell v. Citizens Street R. Co. 152 Ind. 507;
Gatyow v. Buening, 106 Wis. 1, 81 N.W. 1003.

[5] Rule 49, Federal Rules of Procedure.

[6] *Dowd-Feder Co. v. Schreyer,* 124 O.S. 504 @ 513. 179 N.E. 411.

[7] *Webb v. John Hancock Mutl. Co.* 162 Ind. 616, 69 N.E. 1006.
State v. Colonial Club, 154 N.C. 177, 69 S. E. 771.

[8] Clementson on Special Verdicts, p. 45.

[9] 53 Amr. Jur. Sec. 1088, p. 755; *Bank v. Buck Bros.* 161 Iowa 362, 142 N.W. 1004; *Balyer v. Caldwell* (1935) 220 Wis. 270, 263 N.W. 705.

[10] *Dowd-Feder Co. v. Schreyer,* 124 O.S. 504 @ 515; 179 N.E. 411.
See also *Terre Haute & Indianapolis Rd. Co. v. Brunker* 128 Ind. 542, 26 N.E. 178.

mining common law negligence. They would not be advised as to the principles of proximate cause. Statutes and ordinances are not to be discussed with them. The court simply informs the jury as to the issues made by the pleadings, the rules for weighing evidence, and direction as to the burden of proof. It is neither necessary nor proper to give general instructions on the principles of law relating to the case."[11]

It follows that findings in a special verdict that a party was negligent, or guilty of contributory negligence, or that a certain act was the proximate cause of an accident, or that a party violated a certain duty, are all legal conclusions and would not be sufficient to support a judgment unless the verdict also contained, mixed with the conclusions, sufficient operative facts. Indeed, as one court stated it—"A finding by the jury that a certain act of the defendant constituted negligence, and that it proximately caused the injury, would be tantamount to a general verdict and conclusive of the case. A finding that one party was negligent and the other was not would be a mere conclusion of law, and that clearly is not within the province of the jury to determine in a special verdict."[12]

From the above it seems clear that the office of a special verdict is to find facts, *and only facts,* to the end that the court may, by applying principles of the law to the facts found, render the proper judgment.

To prepare a special verdict which will meet these requirements is not often an easy task. Painstaking care must be exercised to first determine the real and vital issues—then to isolate and correlate those material, operative facts which dispose of those issues, all the while making sure that evidential data and conclusions do not creep into the verdict. The difficulty of so doing caused one Judge of an Ohio Appellate Court to declare in an opinion: "It is one thing for a reviewing court to announce abstract propositions of law touching special verdicts. It evidently is another and much more difficult proposition for a trial judge to apply these principles in a practical way to concrete issues. The trial judge in this case had a difficult undertaking. The interrogatories disclose careful and painstaking preparation. Frankly, it is the judgment of the writer of this opinion that it is next to impossible for a trial judge, in collaboration with counsel, to prepare interrogatories in connection with a special verdict in a negligence case in such a manner as that they will meet the requirements of the Ohio cases."[13]

I cannot share the pessimistic conclusion of the judge in that case, but candor compels the observation that a good look into the books will disclose a multitude of cases where such verdicts have been awkwardly and carelessly prepared.

The importance of careful and analytical preparation is further emphasized by the fact that many cases in the reviewing courts are decided upon the basis of *what the verdict does not find, rather than on facts actually found.* The omission of a material fact has spelled the doom of many such verdicts. Remember that the failure of a jury to find a material essential fact does not necessarily invalidate the verdict, but it has frequently been held that *it is equivalent to a finding against the party having the burden of establishing such material essential fact.*[14]

The use of the special verdict in the defense of many negligence cases affords some positive advantages. It restores to the jury its sole, and historic function of a fact finding mechanism. The jury performs that function unhindered and unimpeded by confused notions as to what the law is or ought to be. In finding the particular facts the jury does not necessarily know, when the law is applied, *which party will prevail.* It removes to a large extent the tendency of jurors to initially champion the cause of a party, without going to the pains of thinking through on the issues and the evidence. It compels them to weigh and analyze the evidence, on each issue, in order to determine and find the essential facts. In that respect it tends to diminish the force of the personal, emotional, and psychological factors which, too often and in too many cases, determine verdicts. It forestalls the jury room procedure noted in the two instances cited at the beginning of this article.

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[11] *Udell v. Citizens St. Rd. Co.* 152 Ind. 507, 52 N.E. 799;
Dowd-Feder Co. v. Schreyer, 124 O.S. 504 @ 516, 179 N.E. 411.

[12] Matthias, J. in *Dowd-Feder Co. v. Schreyer,* 124 O.S. 504, @ 515, 179 N.E. 411.

[13] Hornbeck, J. in *Marty v. Floral Products Co.* 17 Ohio Law Abs. 118 @ 123.

[14] *Shirk v. Neible,* 156 Ind. 66, 59 N.E. 281;
Chicago Ry. v. Ramsey, 168 Ind. 390, 81 N.E. 79;
Bates v. Chicago R. Co. 140 Wisc. 235, 122 N.W. 745;
Noseda v. Delmul, 123 O.S. 647; 176 N.E. 571, 76 A.L.R. 1113, See Ann: 76 A.L.R. @ 1143.

Lessor-Lessee Liability As Common Carriers by Motor Vechicle

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IN this article we concern ourselves about the liability of a trucking carrier for damages caused by the negligent operation of a motor truck, where the trucking carrier, having posted security with the I.C.C. or a comparable state authority, and having secured therefrom a certificate of public convenience and necessity to operate trucks in interstate commerce or over state highways, has leased from an owner the truck in question and at the time of the negligent operation was operating that leased vehicle under its own certificate or franchise, with the owner or owner's employee as driver. If the leased vehicle has an accident causing damage and injury to third parties while operating under the trucking carrier's franchise or certificate, the question is: Who bears liability to the third parties, the lessee of the equipment who holds the franchise, or the lessor who owns the equipment?

In most instances, of course, each has its own insurance carrier behind it. Under "Rule 29" a large number of companies have agreed that the carrier for lessee shall have the primary coverage. This has eliminated the necessity for litigation in many cases. However, the instances in which one of the carriers is not a signatory party to Rule 29 appear to be sufficiently frequent to justify the following extended discussion in the hope that it will provide a small start through the legal labyrinth presented by these cases.

Correlative to the above question are a number of others: Is the incidence of liability different where the owner-lessor is on a return trip with an empty truck than where he is on an outbound loaded run? Assuming either the lessee or the lessor is held liable, what may his right of recovery over against the other be? What is the effect of "hold harmless" clauses in the lease agreement between the two parties? What is the effect of an "omnibus clause" in the insurance policy covering either of the parties?

The discussion below sketches the outlines of the answers which the present state of the law gives to these questions.

PART I:

THE GENERAL RULE HOLDING THE FRANCHISE HOLDER LIABLE

The basic principle is that so far as the public or third persons are concerned, the lessee truck carrier possessing the proper franchise or certificate under which a leased truck is operated can be held liable for injury and damage caused by the negligence of the driver or owner of the truck during the period of the lease, *even though the driver or owner would be held by all the common law tests to be an independent contractor and not an employee of the franchise holder.*

This rule has been justified by the courts with several arguments:

1. That a common carrier who, by posting security and making a showing of responsibility, has obtained from the I.C.C. or a comparable state body a franchise to operate in the trucking business cannot delegate to an independent contractor lacking such franchise the obligations, such as the duty of due care, which are imposed upon a franchise holder by law for the benefit of the public; that such a delegation would be a fraud on the public.

2. That the case is governed by the principle of Section 428 of the Restatement of the Law of Torts which declares that one who is carrying on an activity which can lawfully be done only under a public franchise and which involves unreasonable risk of harm to others is subject to liability for harm caused by the negligence of an independent contractor employed to carry out the activity.

3. That, in the case of an I.C.C. franchise holder, the rulings of the I.C.C. explicitly provide that during a lease by which a non-certified trucker operates his truck under the franchise of another, that trucker shall be deemed a "servant" of the franchise holder so far as third persons are concerned, even though by common law he would be an independent contractor. Thus, by this argument,

the trucking carrier holding the franchise can be held liable on the basis of *respondeat superior.*

These arguments all pre-suppose that by common law tests the lessor would be an independent contractor, not an employee of the trucking carrier. Of course, as we shall observe later, cases do arise where the actual facts of the relationship between the lessor and lessee show that by common law tests the lessor is an employee or servant of the franchise holder. In such cases there is no need to resort to any of the above arguments.

In *Duncan v. Evans* (1938) 134 Ohio St. 486, 17 N.E. 2nd 913, the court stated: "... The single question now requiring the consideration of this court is whether a common carrier by motor truck may relieve itself of total liability by delegating its duties to an independent contractor."

Under the general code of Ohio at the time of this case, a trucker was required to furnish a bond in order to secure a permit from the Public Utilities Commission before operating in interstate commerce. In this case Evans had such a permit, but was leasing and operating under its permit a truck owned by one Moore, who did not possess such a permit. The court held that the fact that Moore might be an independent contractor in his relationship with Evans as a lessor could not bar recovery against Evans for harm to third persons caused by a collision resulting from the negligence of an employee of Moore who was driving the truck. Without any mention of Section 428 of the Restatement of Torts, the court stated:

"Apparently the legislature intended to protect the public against loss from negligence on the part of anyone using the highway in the business of transportation by motor truck. Therefore the trial courts were correct in charging the juries that these defendants could not escape liability by delegating their duties to independent contractors."

A concurring opinion further stated:

"... Evans had a certificate to engage in motor transportation business restricted to interstate commerce. He attempted to delegate the duties of carriage of goods to Moore who did not have such a certificate. Moore must therefore be construed to be acting as the agent of Evans, and that construction is in the interest of the traveling public.

"He who permits another to act for him when the other does not comply with all the provisions of the law, does so at his own peril. See Pound, The Spirit of the Common Law, pages 201-202, and annotations in 21 A.L.R. 1234."

In Marriott vs. *National Mutual Casualty Co.* (1952 C.A. 10th Kans.) 195 F. 2nd 462, the S & C Transport Co., holder of a franchise from the Kansas Corporation Commission leased a truck from one Womack, owner-driver of the truck, and obtained wire authority from the Commission to use this truck for 10 days under its franchise. After the 10-day period lapsed, the driver-owner Womack, whom the court held was still under lease to S & C, had an accident caused by his negligence. The court held that S & C and its insurer were liable for the loss caused by the driver's negligence, stating:

"S & C registered the Womack truck and driver with the Kansas Commission and obtained authority to use it in its public carrier business. Armed with this authority, and its lease of the equipment, it initiated the Miami trip under its general franchise or certificate of convenience. It was under this general franchise or certificate of convenience that the merchandise was being delivered . . . To permit S & C and its insurer to escape liability because the special authority covering this equipment had expired enroute would deprive the public of the very protection which the statute was designed to give.

. . .

"The Kansas statute was enacted for the purpose of requiring all persons using the Kansas highways as commercial carriers to carry sufficient insurance on their motor equipment to protect the public in case of injuries sustained from the negligent operation of the same."

See also *Hill v. Carolina Freight Carrier Corp.* (1952) 235 N.C. 705, 71 S.E. 2nd 133, a similar case, decided without reference to Section 428 of the Restatement of Torts or to the "unreasonable risk of harm" in trucking, but simply upon the argument that "public policy" requires that where a trucker is operating under another's I.C.C.

permit he must be regarded as the agent of the franchise holder.

In *Werner Transport Co. v. Dealer's Transport Co.* (1951 Minn.) 102 F.S. 670, Affirmed 203 F. 2nd 549, Beezley owned and drove a tractor for Dealer's, a trucking company, under a lease arrangement. Dealer's were making a shipment between Chicago and Huron, South Dakota. Dealer's had a permit from the I.C.C., but it did not extend beyond Milwaukee, and so Dealer's made a lease with Clark to use Clark's permit between Milwaukee and Huron. In an action arising out of an accident while Beezley was driving under Clark's permit, Dealer's, Clark and Beezley were all held liable. The district court cited a line of cases relying upon Section 428 of the Restatement of Torts, but on appeal the circuit court affirmed without reference to these cases or to Section 428, stating simply:

> "In part all three of the participants were engaged in a joint enterprise and as such were all liable to the parties injured by the negligence of the driver. From another point of view the two transport companies were joint adventurers and Beezley was only their servant and agent. From every point of view all were liable to those injured by Beezley's negligence."

In *Swallow Coach Lines v. Cosgrove* (1938) 214 Ind. 532, 15 N.E. 2nd 92, the Pennsylvania Greyhound lines had a certificate of convenience and necessity from the Public Service Commission of Indiana and entered an agreement with Swallow for the latter to operate its own busses under Greyhound's certificate. In an action against Greyhound and Swallow by one injured through the negligent operation of a Swallow bus under this agreement, the court held that Greyhound could not escape liability, even though Swallow and its driver were in the common law position of an independent contratcor. The court stated:

> "The indeterminate permit (franchise) constituted a contract between the Greyhound lines and the state. One cannot escape the consequences of answering in damages growing out of an assumed responsibility by the defense that he let the discharge of those obligations to another, over whom he has no control."

This decision followed an earlier Indiana decision, *Bates Motor Transport Lines v. Mayer* (1938) 213 Indiana App. 664, 14 N.E. 2nd 91, based upon a similar leased situation where the court said:

> "The defense of independent contractor is not available where a recovery is sought for damages resulting from acts done in violation of a duty imposed by law upon the party charged with responsibility for the injury and he cannot escape liability by engaging for its performance by another . . .
>
> "The appellant was the responsible licensed party to use the highways of the state, in an enterprise necessarily attended by some danger. It cannot avoid liability for injury to third parties by contracting with an irresponsible party. Such a contract would be a fraud upon the public and the state."

See also *Moody v. Consolidated Coach Corp.* (1933) 248 Ky. 180, 58 S. W. 2nd 375, where the court, speaking of the franchise holder in a lease situation, stated:

> "Its responsibility is a concomitant of its franchise and certificate of permit and is ineludible and is enduring for the period for which the certificate of permit was granted unless it is abandoned or sold in conformity with the statutes."

In *Venuto v. Robinson, et al* (1941 3 Cir.) 118 F. 2nd 679, we come to a leading case in a long line of still developing authority which relies essentially upon Section 428 of the Restatement of the Law of Torts in holding the franchise holder liable in a motor truck lease situation. There C. A. Ross, Inc., a trucking company hauling between North Carolina and New England, leased a trailer and two tractor trucks from Robinson. Reviewing the circumstances of the lease by Ross of Robinson's truck and the employment of the latter by the former as a driver, the court held Robinson to have been an independent contractor by the common law tests at the time of the accident out of which this action arose—a collision causing harm to third persons and resulting from the negligence of Robinson. However, the court went on to say:

> "But the determination that Robinson was an independent contractor does not settle the merits of this litigation.

There are many situations at law where an employer of an independent contractor is liable for the result of negligence of the contractor in the carrying out of the undertaking for which he is employed. Among these situations is that where the work to be done may not lawfully be carried on except under a franchise to the contractor's employer. The rule is stated in the Restatement of Torts, Section 428:

'Where an individual or a corporation is carrying on an activity which can be lawfully carried on only under a franchise granted by public authority and which involves an unreasonable risk of harm to others, the individual or corporation is subject to liability for bodily harm caused to others by negligence of a contractor employed to do the work in carrying on the activity.' "

Although the court could find no New Jersey law, (which controlled the action) dealing with the precise point in issue, the court deemed it "proper to rely upon the Restatement of the Law as evidence of the law of the state." The court then held that interstate trucking clearly fell within the rule:

"Interstate motor carriage is now regulated by elaborate rules or regulations set out in the Motor Carrier Act of 1935 and the regulations thereunder. The carriage of freight in high powered motor vehicles on public highways is certainly business attended with very considerable risk."

Noting that the same rule has been applied to hold railroad companies liable for the negligence of independent contractors employed by them, the court emphasized that the plaintiff's remedy against the lessee truck company is common law rather than statutory:

" . . . While there is no master and servant relationship here, there is vicarious liability for acts of an independent contractor; the same result on a somewhat different theory, but each a product of that system of growth by judicial decision which we call the common law."

Although Ross, the truck carrier here, clearly had an I.C.C. franchise under the Motor Carrier Act, and Robinson apparently did not, the opinion makes no mention of any I.C.C. regulations requiring the lessee and lessor to stand in the position of master and servant vis-a-vis the public. The decision rests squarely on the common law principle of Section 428 of the Restatement of the Law of Torts. Although that principle is in many ways similar to the general argument that the duties of a franchise holder are non-delegable with which we have seen the decisions above justified, Section 428 of the Restatement of Torts seems to add in a rather explicit manner the requirement that the activity in question involves an unreasonable risk of harm to others. In this sense, the line of decisions developing from the Venuto case represents a somewhat different legal theory than do the cases already discussed involving the liability of a franchise holding truck carrier.

In *Hodges v. Johnson* (D.C.Va. 1943) 52 F.S. 488, a case decided upon much the same reasoning as the Venuto case, Johnson, having no I.C.C. permit, owned a truck which he leased to the Jocie Motor Lines, who had possession of the proper I.C.C. certificate. One Gilmore was a driver regularly employed by Johnson who operated the truck while it was under lease to Jocie. The victim of a collision caused by the negligence of Gilmore while driving the truck during the period of the lease to Jocie sued Johnson and Gilmore, who in turn filed third party complaints against Jocie Motor Lines.

As in the Venuto case, the court held the owner Johnson to be an independent and that Gilmore was his rather than Jocie's employee. However, the court went on to cite Section 428 of the Restatement of Torts and to hold, "that Jocie is jointly and severally liable with Johnson for the negligence of Jocie's servant, Gilmore." In holding that the case fell within the rule of Section 428 the court first referred to the fact that the activity involved could only be legally carried on under an I.C.C. franchise and then the court stated:

"I am also satisfied that this activity involved an unreasonable risk of harm to others. It is a matter of common knowledge that the transportation of freight upon the highway, usually by means of huge trucks and trailers, is fraught with great danger to the traveling public . . . . It is well known that one of the principal purposes, if not the

primary purpose, of these regulatory laws is the protection of the traveling public upon the highways."

"And upon the question of the risk of harm to others resulting from the transportation of freight upon the highways by motor truck, the Supreme Court of Appeals of Virginia has expressed itself rather vigorously . . . . 'These trucks, sometimes inordinate in size, measurably monopolize the highways and add to the peril of their use, and it is in the light of their potential destructiveness that a high degree of care is but ordinary care. *Boggs v. Plybon,* 157 Va. 30, 160 S.E. 77. Automobiles may not be in themselves dangerous instrumentalities, but freight cars which operate along the public highway intended for the common use of all the people are.' *Aronovitch v. Ayers,* 169 Va. 308-318, 193 S.E. 524-526."

The court's conclusion is thus that the I.C.C. certificate holder can, "be held responsible for the operation of such vehicles under said franchise or certificate, by independent contractors of such certificate holders, and servants and agents." The court then entered an order rendering judgment not only against Gilmore, but against both Jocie and Johnson, "jointly and severally."

In *Martz Coach Co. v. Hudson Bus Trans. Co.* (1945) 44 Atl. 2nd 488, to which we shall refer again later in discussing recovery over, Martz hired from Hudson a bus to be driven by Snider, an employee of Hudson, to transport passengers of the Martz company. Hudson agreed to and did carry liability insurance on the bus. After an accident in which Snider was negligent, passengers presented claims against Martz which, before judgment, were settled by Martz's carrier without knowledge on the part of Snider or Hudson. In a suit by Martz against Snider and Hudson for the amount of the settlements, the court, before disposing of the claim for recovery over, held that Martz had properly been charged with responsibility for the accident by the injured passengers. With no reference to I.C.C. regulations requiring that the lessor and lessee of a motor truck be deemed master and servant, the court spoke the language of Section 428 of the Restatement of Torts:

". . . . And it is settled that the obligation of a common carrier to exercise a high degree of care for the safety to its passengers cannot be delegated to an independent contractor and its agents, particularly where, as here, the carrier, whether engaged in interstate or intrastate motor carriage, is regulated by elaborate rules and regulations and required to obtain a certificate or permit to operate . . . . and therefore is in the exercise of a public franchise or privilege involving risk of harm to others."

Again in the Martz opinion the court refers to cases in which the principle of Section 428 has been used to hold a railway company liable for the negligence of contractors in its employ, including the negligence of servants of the Pullman Car Company.

In accord with the above cases and relying primarily upon Section 428 of the Restatement of Torts in order to hold responsible the trucking carrier, reference should also be made to the following cases: *Virgil v. Riss and Co.* (1951, Mo.) 241 S.W. 2nd 96; *Jocie Motor Lines v. Johnson* (1950) 231 N.C. 367, 57 S.E. 2nd 388; *Newsome v. Surratt* (1953) 237 N.C. 297, 74 S.E. 2nd 732; and *Eli v. Murphy* (1952) 39 Cal. 2nd 598, 248 Pac. 2nd 756. Also *War Emergency Corp. Assoc. v. Widenhouse* (C.C.N.C. 1948) 169 F. 2nd 403, certiorari denied 335 U.S. 898. Note that a number of these cases are referred to in a short annotation on motor carrier liability at 34 A.L.R. 2nd 1121.

Although courts seem commonly to accept the idea that trucking involves an unreasonable risk to the public within the meaning of Section 428 of the Restatement of Torts, at least several courts have questioned the soundness of this reasoning. In *Costello v. Smith* (1950) 179 F. 2nd 715, 16 A.L.R. 2nd 954, the court, denying the plaintiff recovery against an interstate trucking carrier on other grounds, by way of dictum questioned the applicability of Section 428 to interstate trucking:

"It may well be doubted whether a trailer truck is an intrinsically dangerous instrument to be classed with ferocious animals or high explosives, in applying the above noted principle. See *Greely v. Cunningham,* 116 Conn. 515, 165 Atl. 678, Restatement of Torts, Section 427, Comment a."

The Greely case, decided in 1933, deals

not with trucking but with the loan of a private passenger car. The court held: "An automobile, while capable of doing great injury when not properly operated on the highways, is not an intrinsically dangerous instrumentality to be classed with ferocious animals or high explosives . . ." Actually, the expression, "inherently dangerous," or, "intrinsically dangerous," is not the language of Section 428, which refers simply to "unreasonable risk of harm to others," but is a phrase used in Section 427 "a" of the Restatement of Torts which gives the following definition:

"Comments:

"a. Meaning of 'inherently dangerous.' The words 'inherently dangerous work' are used to indicate not only that the nature of the work itself, or of the instrumentalities which must necessarily be used in doing it, is such that it can only be safely performed by the exercise of a special skill and care, as distinguished from work which can be safely done if performed with ordinary skill and care or is dangerous irrespective of whether special skill or care is used, but also that the work, if unskillfully and carelessly done, involves a grave risk of serious bodily harm or death.

"The usual situations in which the liability stated in this Section is imposed are those in which the work in hand involves the use of instrumentalities, such as fire or high explosives, which require constant attention and skillful management in order that they may not be injurious to others or those in which the work itself, like the demolition of a high chimney, is incapable of being safely done unless the persons who do it are highly skilled and act with the utmost attention and care. The liability stated in this Section extends only to harm which is caused by the failure so to act as to minimize to the uttermost the danger inherent in the nature of the work or in the instrumentalities used. It does not extend to harm caused by negligence in a particular detail of the work which in itself is not inherently dangerous. Thus, one who employs a contractor to do blasting close to a public highway or to the land of another is liable under this Section if the blasting is carelessly done or the explosives carelessly handled by the contractor or his servants. He is not liable if the driver of one of the contractor's carts while conveying explosives to the place of work, carelessly runs over and injures a traveler upon a highway. So too, one who employs a contractor to demolish a high chimney or a wall made ruinous by a fire, is liable under the rule stated in this Section for the contractor's failure to use the utmost skill and competence in preventing his work from causing the building to fall upon an adjacent highway or land. He is not liable for harm caused to persons on the adjacent highway or land by the carelessness of a workman in dropping a tool."

In *Barry v. Keeler* (1947) 322 Mass. 144, 76 N.E. 2nd 158, the court, although citing and relying upon Section 428 of the Restatement of Torts, declared:

> "We accept the principle of this statement, but without adopting the word 'unreasonable' as wholly appropriate in this connection. The rationale of the rule is that it is considered contrary to public policy to permit one engaged in such an activity to delegate his responsibility to others. . . . And we agree with the statement in *Venuto v. Robinson*, 118 F. 2nd 679-682 that 'the carriage of freight in high powered motor vehicles on public highways is certainly business attended with very considerable risk.' "

In *Eckard v. Johnson* (1952) 235 N.C. 538, 70 S.E. 2nd 488, the court, denying recovery for the reason that the truck lease had expired, also observed by way of dictum:

> "Nor should the court characterize the driving of an empty ton-and-a-half truck along the highways as an activity involving unusual or unreasonable risk of harm to others."

In his article, "Legal Liability for the Operation of Leased Trucks," in the *Insurance Law Journal*, May, 1951, Page 333, Frank J. Pause calls attention to a significant administrative ruling of the I.C.C., first promulgated in 1936 and rephrased in 1939. Said administrative ruling No. 4 of the I.C.C. reads as follows:

> "The lease or other arrangement by which the equipment of an authorized

operator (meaning, of course, the party who has the certificate or permit) is augmented, must be of such a character that the possession and control is for the period of the lease entirely vested in the authorized operator in such a way as to be good against all the world, including the owner-lessor, and the operation thereof must be conducted under the supervision and control of such carrier and the vehicle must be operated by persons who are employees of the authorized operator. That is to say, the operator shall stand in relation to the carrier-lessee as servant to master." (ICC Administrative Ruling No. 4.)

According to Pause's interpretation, and it seems to be one accepted by the courts, this ruling creates a legal fiction of master and servant between the lessee-franchise holder and the lessor-truck owner, so far as third parties injured by negligent operation of the truck are concerned. Mr. Pause seems to attribute to this Ruling and interpretation the winning of a directed verdict for the owner-lessor in *Tompkins and Fitzgerald v. The American Transportation Co. and the B & B Truck Line* (D.C. Ill., No. 50C70), a damage suit in a leased motor truck situation.

Although we have found no case in the reports in which a court has explicitly referred to Ruling No. 4 in granting recovery *to an injured third party* against a franchise holding truck carrier, that Ruling has been implied or mentioned by courts in cases involving workmen's compensation claims by the driver of the leased truck against the franchise holder and involving problems of recovery over by the franchise holder against the owner or driver. These cases confirm the interpretation which Mr. Pause places on Ruling No. 4. In *Behner v. Industrial Commission*, 154 Ohio St. 433, 96 N.E. 2nd 403-404, the court stated:

"The purpose of administrative Rule No. 4 of the Bureau of Motor Carriers of the I.C.C. . . . . is to make a carrier responsible to the public for wrongs done or injuries inflicted by the carrier or those acting for it throughout the entire course of any transportation project undertaken by the carrier, and under such rule the employing carrier, as well as his independent contractor performing transportation for such carrier, may be held liable to third persons for injuries resulting from the negligent conduct of the independent contractor in such transporation."

The device by which Ruling No. 4 has this effect of holding the truck carrier liable is of course the master-servant fictional relationship, which enables an injured third party to recover against the carrier under the principle of respondeat superior.

Some courts however have unfortunately extended the fiction of master and servant in Ruling No. 4 to apply to claims other than those of third parties or of the public injured by the negligence of an owner or driver of a leased vehicle. In *Firestone v. Industrial Commission*, 144 Ohio St. 398, 59 N.E. 2nd 147, it was held that the fiction of master and servant between the truck carrier and driver-owner established by Ruling No. 4 and a contract made thereunder were controlling in a workmen's compensation action by a driver, injured in a collision, against the franchise holder, even though at common law the actual relationship between the driver and the franchise holder was one of independent contractorship. And in *Brown v. L. H. Bottoms Truck Lines*, 227 N.C. 299, 42 S.E. 2nd 71, where at common law the injured driver would clearly have been regarded an independent contractor, the court also granted recovery in a workmen's compensation action against the franchise holder or lessee on the ground that the truck could not be legally operated in interstate commerce under Ruling No. 4 unless the driver was an "employee" of the carrier. The court reached this decision even though the driver-owner had agreed in writing to indemnify the carrier for any damage arising from the operation of the truck.

Although these cases suggest the degree to which some courts have extended the master-servant fiction of Ruling No. 4, recent cases have generally refused to apply the fiction to workmen's compensation actions, or to actions for unemployment compensation and social security taxes. If by the common law tests, a driver is an independent contractor, the fiction generally will be held not to be applicable except where third persons are seeking to recover from the carrier for injuries caused by the driver's negligence. That was the precise purpose for which the master-servant fic-

tion of Ruling No. 4 was created, and that Ruling should not be distorted to place on the carrier the additional burden of workmen's compensation claims and unemployment and social security taxes where the worker's real relationship with the carrier is as an independent contractor. *Behner v. Industrial Commission* (1951) 96 N.E. 2nd 413; *Commercial Motor Freight v. Ebright,* 145 Ohio St. 127, 54 N.E. 2nd 297; *Mutual Trucking Co. v. U.S.* (D.C. 1943) 51 F.S. 114, aff'd. 6 cir. 1944, 141 F. 2nd 655; *Midwest Haulers' v. Brady* (6 cir. 1942) 128 F. 2nd 496. *Treyvan Lines v. Harrison* (7 cir.) 156 F. 2nd 412, aff'd. 331 U.S. 704; *Wilds v. Morehouse,* 152 Neb. 749, 42 N.W. 2nd 1649.

The case of *Trautman v. Higbie* (1952 New Jersey) 89 Atl. 2nd 649, another typical leased truck situation, is interesting in that in holding the carrier liable the court relies not only on Section 428 of the Restatement of Torts, but also on 49 U.S.C. Section 315. The court indicates that probably Section 315 of the Motor Carrier's Act is by itself sufficient to establish the liability of a trucking carrier in a lease situation. The salient portion of Section 315 relied upon in the Trautman case is quoted below:

> "No certificate or permit shall be issued to a motor carrier or remain in force, unless such carrier complies with such reasonable rules and regulations as the Commission shall prescribe governing the filing and approval of surety bonds, policies of insurance, qualifications as a self-insurer or other securities or agreements in such reasonable amount as the Commission may require, conditioned to pay, within the amount of such surety bonds, policies of insurance, qualifications as a self-insurer or other securities or agreements, any final judgment recovered against such motor carrier for bodily injuries to or the death of any person resulting from the negligent operation, maintenance, or use of motor vehicles under such certificate or permit, or for loss or damage to property of others."

There are several cases in the reports dealing with the liability of a lessee-motor carrier which have been decided by the courts on the basis of the purely common law rule of master and servant, without reference to Section 428 of the Restatement of Torts or to any of the I.C.C. regulations or to the Motor Carrier's Act. In these cases apparently the facts demonstrated that the driver of the leased vehicle was, by common law tests, a servant of the lessee-motor carrier at the time of the accident involved.

In *Kemp v. Creston Transfer Co.* (D.C. Iowa 1947) 70 F.S. 521, Creston, the holder of an I.C.C. certificate, was a lessee of a tractor trailer unit owned and driven by one Lambert. Action was brought in state court by one injured in a collision by Lambert's negligence. The defendants Lambert and Creston removed to a federal court where the plaintiff obtained a verdict for $15,000.00. The defendants then moved for a new trial.

The lease in question provided that all equipment leased was to be under, "the complete possession, control, direction and dominion of the Creston Transfer Co." Despite this, Creston claimed that Lambert was an independent contractor. In answer to this, Judge Graven first observed:

> "However, if it were assumed that the defendant Delbert Lambert was an independent contractor, it is believed that the defendant Creston Transfer Co. would still be liable for the damage to the plaintiff occasioned by the defendant Delbert Lambert in operating the trailer unit in question under its I.C.C. permit."

Judge Graven then went on to cite and to quote from *Venuto v. Robinson and Hodges v. Johnson,* supra.

However, the actual holding of the cases seems rather to be that the driver-owner Lambert was, by common law standards, an employee of Creston and that Creston could therefore be held liable on the basis of respondeat superior. In reaching this conclusion, Graven refers to the case of *Skutt v. Dillavou* (1944) 234 Iowa 610, 13 N.W. 2nd 322, another truck lease case where the evidence indicated that the position of the lessor-driver who was hauling for the certificate holder was really the same as that of the permanent employees of the certificate holder who drove its own trucks. The Iowa Supreme Court therefore held in the Skutt case that the lessor was an employee rather than an independent contractor, with the consequence that the I.C.C. certificate holder was held to

have been properly served with notice within the meaning of the Iowa statutes relating to jurisdiction and service of notice.

In the *Kemp v. Creston Transfer Co.* case, Graven simply stated:

> "It would seem that under this holding of the Iowa Supreme Court (the Skutt case) that in the present case the defendant Creston Transfer Co was in charge of the truck and of the use and operation of it and that under Section 321.498 was liable 'for damages to person or property growing out or arising out of such use and operation.' "
>
> "The fact that the defendant Delbert Lambert owned part of the unit and a partnership of which he was a member owned the other part of the unit would not prevent the defendant Delbert Lambert from being an employee of the defendant Creston Transfer Co."

Thus both the Kemp and Skutt cases are in fact decided upon the common law principle of respondeat superior, rather than the other grounds which we have found courts using to hold a lessee-motor carrier liable. See also *Wood v. Miller* (1946) 226 N.C. 567, 39 S.E. 2nd 608, another case decided upon the basis of respondeat superior. Incidentally these three above-mentioned cases are frequently cited along with cases like *Venuto v. Robinson and Hodges v. Johnson,* supra, in the mistaken belief that they were decided upon the same rationale as the latter two mentioned cases.

PART II:

Return Trip

The same general rule, as discussed above in Part I, placing liability on the franchise holder is generally applied by courts to the case where the accident occurs after the driver has made delivery and is on the return run with an empty truck, providing the lease in question can be reasonably construed as covering the return trip. The exception to the general liability of the franchise holder appears to be the case in which the lease is a one-way, one-trip lease, specifying that only on the outbound run is the vehicle operating under the lessee's certificate.

In *Hodges v. Johnson,* supra, the accident occurred on the return trip with an empty truck. The lease did not limit the use of the carrier's certificate to only the outbound run. The court said that if the carrier was to be held responsible on the outbound trip, it would be, "absurd to say that this responsibility should attach while the truck is proceeding on its journey loaded, and should not attach on the return journey while empty," because both trips were, "necessary parts of the same trip and the whole trip was taken and was being made under the authority of (the lessee's) franchise."

However, in *Costello v. Smith* (1950 C.A., 2nd Cir., Conn.) 179 F. 2nd 715, 16 A.L.R. 2nd 954, the lease involved was to cover only "one way," the outbound trip, and was to end upon delivery at destination. The lease provided that upon discharge of the load at the destination, the lessee should immediately, "deliver said vehicular equipment into the possession of the lessor or its agent at the point of discharge and all obligation and responsibility of the lessee under the terms of the lease shall immediately cease." The facts of actual delivery showed that this provision of the lease was followed and that after delivery the lessee attempted to exercise no control over the vehicle.

The court held that under such a lease the franchise holder could not be held responsible in an accident occurring after delivery on the return trip. The court felt that such a lease was not forbidden or barred by anything in the I.C.C. Act or I.C.C. Rules and Regulations.

As observed above in Part I, the court also doubted whether, "a trailer truck is an intrinsically dangerous instrumentality to be classed with ferocious animals or high explosives." But the court went on to say that even if the Restatement, Section 428, is applicable to trucking, the carrier can be held liable only for a contractor whom it has in its employ. The peculiar feature of the Costello situation was that the employment of the contractor had, under the lease, ceased, and so the court felt that it had no opportuinity to apply Section 428.

In *Marriott v. National Mutual Casualty Co.* (1952 C.A., 10th Cir., Kans.) 195 F. 2nd 462, involving another accident on a return trip, the defendant tried to escape liability on the basis of the Costello case, supra. However, in the Marriott case the provision in the lease form specified that the lease was, "for not less than .... months." The testimony was that this had been changed to read in the particular

lease, "not less than 10 days." The court held that this was an indefinite lease for an indefinite time, and that the carrier could be held liable for negligent operation of the truck on return trips, even on a return trip more than 10 days after execution of the lease.

In the Marriott case, apparently after reaching his original destination, the driver, rather than returning immediately to his original point of departure, made a detour haul for another carrier under a separate lease. It was only after this detour that he returned to the route usually used by his original lessee's trucks to return from the destination. As for the detour, the court stated:

> "When Womack, enroute home, undertook to transport the goods from Tulsa to Wichita for Riss and Co., he was on an enterprise of his own which then constituted a temporary departure from his employment by S and C."

Even though the lease in the Marriott case contained the following clause:

> "Lessee's responsibility for any and all liability under this contract shall be only during the operation of the above equipment, while the same is *hauling freight* on the routes of the lessee",

the court stated:

> "We do not have a factual situation similar to that presented to the 2nd Circuit in *Costello v. Smith* . . . . there the lease was specific and provided that it was for a one-way trip. It specifically provided that the truck was to be returned to the owner upon delivery of the freight at its destination, and the lessor was relieved of any further responsibility."

See also *Cotton v. Ship by Truck Co.*, 337 Mo. 270, 85 S.W. 2nd 80, in accord.

In *Eckard v. Johnson* (1952) 235 N.C. 538, 70 S.E. 2nd 488, we seem to have another Costello "one-way lease" situation, where the lease provided:

> "This lease becomes effective September 25, 1947 and terminates upon the completion of delivery to the consignee of the freight at final destination."

In an action arising out of an accident on the return trip, the court approved Section 428, but stated:

> "But we do not think this principle of law is applicable here. The injury complained of did not occur while goods were being transported in Brady's truck in interstate commerce under Johnson's franchise. The injury was sustained while Brady was driving the empty truck along a North Carolina highway sometime after the freight had been delivered and the truck returned to the place of origin. . . . Nor should the court characterize the driving of an empty ton-and-a-half truck along the highway as an activity involving unusual or unreasonable risk of harm to others."
>
> "Except as modified by the trip lease agreement under the I.C.C. Regulations, as set out in the record, the relationship of Brady to Johnson was always that of an independent contractor.
>
> "We perceive no valid ground for holding that the relationship which the law created for the Virginia trip by the use of Johnson's permit continued thereafter to characterize Brady's activity on this trip to Hickory. His trip to Hickory to check the freight bill and collect his pay was in his own interest rather than in the service of Johnson. For this purpose the use of the truck was not required."

In *Simon v. McCullough Transfer Co.* (1951) 155 Ohio St. 104, 98 N.E. 2nd 19, the owner lessor apparently hauled coal continuously for the defendant-certificate holder. On the day in question, after delivering the last load of coal, the owner went with his empty truck to a beer garden. Some two hours later he was involved in an accident while driving the truck. The court observed that this was at the beginning of a weekend and that the coal mine from which the trucker hauled was closed until Monday. The court quoted in full Ruling No. 4 of the I.C.C. Regulations and declared that this Rule, creating the master-servant fiction, makes immaterial the fact that the driver-owner was at common law an independent contractor. The court said that the question was rather whether the owner-driver was, "in the course of any transportation," undertaken by the defendant. The Court of Appeals had held it to be a jury question for the

reason that a jury would have been warranted in finding that the driver and defendant intended that he should continue in its service until the weigh sheet as to tonnage delivered was returned to the defendant's office.

The Supreme Court of Ohio reversed this decision, holding the defendant not liable. The court stated:

> "At the time of the accident Bolton was not carrying on the activity for which he had been employed by defendant. His relationship with the defendant had ceased about two hours before the accident, his truck was empty, and he was not reporting back to defendant."
>
> "Bolton had been to a beer garden and was on a route which led to his home, but, so far as any responsibility to defendant was concerned, Bolton could have gone anywhere he pleased, could have contracted for any work which suited him, and could have removed from his truck the Public Utilities Commission and I.C.C. permits of the defendant because he did not need them at the time of the accident."

PART III:

Right Of Recovery Over

As the cases below suggest, the right of recovery over by a lessee-franchise holder against an owner or driver of leased equipment is less than unequivocally established in the present law. Apparently a good deal is likely to depend upon the terms of the lease agreement between the owner and franchise holder.

In *Carter v. E.T. and W.M.C. Transportation Co., Inc.,* (1949) 243 S.W. 2nd 505, 35 Tenn. App. 196, the company was an interstate carrier operating under an I.C.C. certificate. Carter owned a tractor and trailer unit which he leased to the company on a mileage basis. As a result of a collision apparently caused by the negligence of a servant of Carter while driving the truck unit for the company under the lease, suits were brought against the driver, Carter and the company. The company and its insurance carrier then settled all claims for $17,000.00. Carter and his carrier refused to acquiesce in the settlements and the company brought suit against him to recover their amount.

The important relevant provision in the lease stated that the lessor, "will be liable for all personal injuries or property damage, and shall carry all public liability and property damage insurance required by federal or state laws and regulations."

The court first observed the general rule that there can be no contribution among joint tort feasors, but then went on to hold that this case fell within a well-defined exception to that rule:

> "Where several are jointly responsible for an act not necessarily nor ordinarily unlawful, one who acted without moral guilt or wrongful intent in the commission of the act, and who had paid the damages caused thereby, may recover contribution from the other wrongdoers."

The court then made the following application of this exception to the case at hand:

> "The complainants liability would be of a constructive or derivative nature, thus falling within the exception or limitation set out in *Cohen v. Noll,* supra. That such liability existed cannot be questioned, inasmuch as defendant was carrying complainant's freight under its certificate as a common carrier. . . ."
>
> "Then the question is, did it have the right to satisfy this liability over the protest of the defendant? In 18 C.J.S., Contribution, Section 4, Page 8, it is said: 'One who has satisfied the joint obligation is entitled to contribution, notwithstanding he paid through his insurance carrier.' And, at Page 9, 'It is not necessary that the payment should have been made at the request of the co-obliger, but it may even be made against his protest. . . .'"

And the court concluded:

> "The complainant's rights are based upon the law governing such situations, and, further, by the express contract of the parties herein—before noted by the terms of which the defendant was to, 'be liable for all personal injuries or property damages' caused by the operation of the particular truck."

The court also cites Section 76 of the Restatement of the Law of Restitution:

> "A person who in whole or in part has discharged a duty which is owed by

him, but which as between himself and another should have been discharged by the other, is entitled to indemnity from the other, unless the payor is barred by the wrongful nature of his conduct."

In granting recovery to the lessee against the owner of the vehicle, the court left in doubt the exact extent to which it relied upon the general law of restitution and contribution, exclusive of the indemnity agreement, and the extent to which it relied upon the express provision of the lease. Up to a point it appears that the court might have reached the same decision even if the special indemnity provision of the lease had been lacking. However, in answering the defendant's contention that the indemnity clause was void and illegal because it evaded the provisions of Section 315 of the Motor Carrier Act, the court places such emphasis upon the lease provision that one wonders if that provision was not an indispensable element in the decision. The court stated:

"The contract in question was to fix the rights *inter sese*, and in nowise could be deemed to limit the rights of third persons. Instead of being opposed to, it (the lease provision) was in conformity with, the spirit of the Motor Carrier Act looking to the protection of the public. . . . It seems to us to be a contract of such nature as would be entered into by any reasonably prudent person, and we are unable to find the slightest taint of illegality."

However, note that the very next paragraph in the opinion reads as follows:

"The third assignment asserts the chancellor erred in holding the defendant to be primarily liable for the damages caused by the accident in question. This is necessarily disposed of by what has been said, and is overruled."

In *National Mutual Insurance Co. of D.C. v. Liberty Mutual Insurance Co.* (C.A.D.C. 1952) 196 F. 2nd 597, cert. denied 344 U.S. 819, Mench the owner-driver of a truck, leased his vehicle to Elliott Bros., a franchise holding truck carrier. In an action arising out of an accident while the truck was being driven by Mench under the lease, an injured third party recovered a judgment against Mench which was never satisfied, and the injured party then sued his insurance carrier, National. National claimed its liability did not begin until all other insurance available to Mench was exhausted and that Mench had other insurance available to him under a Liberty liability policy covering Elliott. National then filed a third party complaint against Elliott and Liberty and prayed for judgment against Elliott and Liberty in case of a judgment against itself.

The upper court affirmed dismissal of this third party complaint by the court below, holding that there was no basis for any right of subrogation by the negligent owner-driver or its carrier against the I.C.C. certificate holder on whose business the truck was being operated. The court stated:

"On principle, the loss has fallen squarely where it should—on Mench, the negligent driver of the vehicle, and on his insurer. They cannot shift it to the innocent employer-lessee, Elliott Bros., or to the latter's insurer, simply because Mench was driving the vehicle on Elliott Bros. business at the time of the wrongdoing. See *Kenneth v. Travelers Insurance Co.*, 127 Wisc. 665, 217 N.Y.S. 261; *American Automobile Insurance Co. v. Penn Mutual Indemnity Co.* (3 cir.) 161 F. 2nd 62; *Compare George's Radio v. Capitol Transit Co.*, 75 U.S. App. D.C. 187, 126 F. 2nd 219."

Although the court observed that National might have a right of subrogation if Mench were covered by Liberty's policy on Elliott, the court held that that policy did not cover Mench for the policy provided:

"The insurance with respect to any person or organization other than the named insured does not apply . . . . (d) with respect to any hired auto, to the owner thereof, or any employee of such owner. . . ."

The court stated that although an injured party might recover against the named insured, Elliott Bros., and thus hold Liberty liable, if he brought suit solely against the owner of a hired vehicle, Liberty assumed no responsibility.

Finally, the court held that the result of the case was not changed by the I.C.C. endorsement in the Liberty policy issued to Elliott, providing:

". . . The company hereby agrees to pay any final judgment recovered against the insured for bodily injury to or the death of any person . . . . resulting from the negligent operation, maintenance or use of the motor vehicle under certificate of public convenience and necessity or permit issued to the insured by the I.C.C."

Concerning this endorsement the court stated:

"The endorsement was required by the Interstate Commerce Act, 49 U.S.C.A. 315, for the protection of the public; it would have enured to the benefit of Jennie Emens, had she chosen to sue Elliott Bros. But, it hardly serves to shift Mench's liability from his own insurer to Elliott Bros. insurer. Nor does it make Mench an 'insured' under the Liberty policy; that is still a matter governed by the express provisions of the body of the contract."

In *Newsome v. Surratt* (1953) 237 N.C. 277, 74 S.E. 732, the defendant Porter, the driver of a truck owned by Transit Co., but leased to Motor Lines and operated under its I.C.C. permits, negligently injured the plaintiff in a collision. By common law tests Porter was an employee of the Transit Co. The Transit Co. agreed in the lease to indemnify the lessee against any loss from injury or death caused by the negligence of the driver. The court entered judgment in favor of plaintiff against Motor Lines for $6,000.00 and gave the Motor Lines judgment over against Porter and the Transit Co. for the same amount. On appeal by the latter two defendants the judgment was upheld. The court, citing *Venuto v. Robinson and Hodges v. Johnson,* discussed above in Part I, clearly approved the general rule that the I.C.C. certificate holder can be held responsible to the public. However, where the carrier is held liable vicariously by reason of law rather than actual participation in the wrongful act, the rule against contribution between joint tort feasors does not apply. The court then stated:

"The liability thus imposed on interstate franchise carriers is to prevent such carriers from evading their responsibility by the employment of irresponsible persons as independent contractors. . . . *War Emergency Coop. Assoc. v. Widenhouse,* supra. However, as pointed out by Parker, J., in the last cited case, the liability of the franchise carrier was secondary, and in the absence of some countervailing equity, the carrier is entitled to recovery over against the owner of the leased truck."

"And the duty imposed by law with respect to third parties in no way interfered with the right of the lessor to agree to indemnify the lessee for any loss it might sustain as a result of the negligence, incompetence or dishonesty of any driver which the lessor might furnish to operate the leased truck."

Again, this decision leaves the reader in doubt as to whether the recovery over would have been upheld had the lessor not agreed expressly to indemnify the lessee. Surely the flat statement of the court that the lessee's liability is "secondary" suggests that the indemnity agreement was not a prerequisite for recovery over, but the references at other points in the opinion to the indemnity agreement leaves one uncertain as to the exact basis for the holding of the case.

In *War Emergency Coop. Assoc. v. Widenhouse* (1948) 169 F. 2nd 403, the defendant cooperative was licensed by the I.C.C. to carry gasoline in interstate commerce. Widenhouse was the owner of a truck being operated under the cooperative's permits and it was also the employer of the truck's driver. While delivering gas to Widenhouse's filling station, this truck exploded, apparently because of the negligence of the driver, causing damage to Widenhouse and to other persons. The cooperative claimed that it was under no liability to Widenhouse and that as for judgments recovered against it by other plaintiffs, it was entitled to recovery over against Widenhouse and the driver.

Apparently the situation in this case differs from that in most cases already discussed in that the cooperative was something of a "dummy corporation" which Widenhouse and a number of truck owners had chartered and for which they had procured an I.C.C. permit. Although they then went through the form of leasing their trucks to the cooperative in order to operate under its permits, the cooperative had nothing to do with the operation of the trucks or the procurement of freight business for them. The cooperative's functions were limited to collecting transporta-

tion charges from customers, which it remitted to the owners after deducting a small percentage to cover insurance and other expenses. Cargo, property damage and public liability insurance was taken out on the trucks in the name of the cooperative, and the premiums were deducted from the cooperative's remittances.

Widenhouse had complete control over his truck and driver. At the time of the accident the truck was on business which had come to him and not the cooperative, and the cooperative did not even know about it.

The lease between Widenhouse and the cooperative provided that the cooperative should engage qualified employees to operate the trucks and should, "direct, control and manage the use thereof as if title to same were vested in it. . . ." On the basis of the evidence presented by the record, the court found however that this clause of the lease was completely overlooked in practice. The court then held the driver of the truck to be an employee of Widenhouse and that the true position of Widenhouse with respect to the cooperative was that of an independent contractor. But the court went on to say:

> "We agree with the District Judge that so far as shippers and the general public are concerned, the defendant having accepted a license authorizing it to operate gasoline trucks upon the public highways in interstate commerce, must be held responsible for the operation of the trucks under the license, even though this is done through the agency of independent contractors."

The court then held that although third party plaintiffs could recover against the cooperative, the plaintiff Widenhouse was without remedy against the cooperative because of the actual relationship between himself and the negligent driver:

> "The estoppel operating on behalf of the general public to prevent the holder of the license from denying responsibility for damages resulting from operations conducted thereunder by an independent contractor manifestly cannot be extended to protect the independent contractor himself from responsibility for his own negligence or that of employees whom he directs and controls, for the simple reason that no one may recover on account of his own wrong."

Referring to the lease provision between Widenhouse and the cooperative and to Ruling No. 4 of the I.C.C., the court further stated:

> "None of these things, however, nor all of them taken together, furnish any reason for ignoring the true relationship existing between the parties or for allowing Widenhouse to recover from the defendant for damage caused by the negligence of his own employee. The rule of the commission relied upon is for the protection of shippers and others affected by the operation of the trucks under the license, not for the protection of those who engage with the licensee in such operation in violation of the rule. As for the contract provision it was not observed and manifestly cannot affect the question of liability, which is to be determined by the real relationship of the parties . . . . the liability insurance was to protect those operating the trucks against claims for damage on the part of the public, not to protect the operators against damage which they themselves sustained from that operation."

The court then dealt with the issue of recovery over by the cooperative for the judgments granted to the other plaintiffs:

> "We come then to the question as to whether defendant may have judgment over against Widenhouse for the judgments rendered in favor of the other plaintiffs. We are disposed to agree with the contention that the primary liability for the explosion rests upon Widenhouse, and that, since defendant is liable to Mamie Widenhouse and to Beard only because the truck was operated under its license, it's liability should be treated as secondary, with recovery over in the absence of some interferring equity. *Gregg v. City of Wilmington,* 155 N.C. 18, 70 S.E. 1070; *Travelers Ins. Co. v. Great Lakes Engineering Works Co.,* 6 Cir., 184 F. 426-431, 36 L.R.A. 60; *Gray v. Boston Light Co.,* 114 Mich. 149, 19 Am. Rep. 324. There is a countervailing equity here, however, and it is to be remembered that the right of recovery over rests entirely upon equitable principles . . . . Defendant under agreement with Widenhouse covered the

truck with property damage and public liability insurance. This was for the benefit of Widenhouse and the premiums were charged against collections made in his behalf. Defendant thus assumed responsibility for claims arising out of the operation of the truck; and neither it nor the insurance company covering the risk should be heard to ask recovery over against Widenhouse for claims which the insurance was to cover."

With reference to the holding in the Widenhouse case, supra, that Widenhouse cannot recover against the lessee-certificate holder for damages caused by one who was in reality Widenhouse's own employee, we should also note the case of *Hill v. Carolina Freight Carrier Corp.* (1952) 235 N.C. 705, 71 S.E. 2nd 133. There the truck which was under lease to the defendant had a collision with another truck being driven by an employee of the defendant. The driver of the first truck had agreed to hold the lessee-franchise holder harmless for any liability resulting from the operation of the truck under the defendant's certificates. The court held however that such an exculpatory clause cannot be construed to exempt the indemnitee from his own negligence or the negligence of a servant, and that since the collision in this case was apparently caused by the negligence of the driver of the second truck, the driver of the first truck could recover against the defendant.

It should be noted that the Widenhouse and the National Mutual Insurance Co. cases above discussed both cite a number of other cases as support for the holding that the driver or owner of the truck in question was the party primarily liable for damages caused by his negligence, rather than the certificate holder, even though the certificate holder could be held responsible to the public. It should be noted that with one exception these cases cited for the above holding deal not with leased or loaned motor vehicles, but with other situations where a person not actually participating in a wrongful act is held liable to the public by construction of law. These cases, such as *Gregg v. City of Wilmington* 155 N.C. 18, 70 S.E. 1070, granting recovery over to a city for a judgment recovered against it by one injured by a contractor's placing an obstruction in a street; and *Travelers Ins. Co. v. Great Lakes Engineering Works Co.* (6 Cir.) 184 F. 426, involving recovery over by an employer who was held liable by his employees not because of negligence on his part, but because an independent contractor installing a dangerous machine on the employer's premises was negligent—these cases may be relevant to motor lease situations but are not primarily in point.

However, *American Auto Ins. Co. v. Penn Mutual Co.* (3 Cir.) 161 F. 2nd 62, involved a loan of an automobile by Pender to Wasilindra. The latter had been required by state law to have a "financial responsibility insurance certificate" before he could have his driver's license extended after a previous automobile mishap. Wasilindra's policy provided that said insurance should be "excess insurance" over and above any valid and collectible insurance available to the insured. Pender's policy stated that its coverage did not apply to any person with respect to any loss against which he had any valid collectible insurance.

In a personal injury action, neither insurance company was willing to admit coverage under terms of its policy. The plaintiff got judgment against Wasilindra's carrier, which sought to be indemnified by Pender's carrier by virtue of the excess clause in Wasilindra's policy. Wasilindra's carrier argued that all that was decided by the earlier action was, "that as against an injured third party the company which furnished Wasilindra the financial responsibility insurance certificate must pay for the harm done by Wasilindra's negligence in automobile management." The court held that even though the plaintiff might have recovered initially against Pender's carrier under Pender's policy, Wasilindra was the tort feasor and was primarily liable, and his carrier, having suffered a judgment, could not recover over. The court stated:

"It is well settled in many instances that where one who is primarily liable has paid his obligation, he cannot come back against a secondary party for contribution or indemnity even though an injured third party m i g h t proceed against either one of them."

In *Martz Coach Co. v. Hudson Bus Trans. Co.* (1945) 44 Atl. 2nd 488, Martz, a bus company, hired from Hudson, also a bus company, a bus to be driven by defendant Snyder, an employee of Hudson, in order to transport passengers of Martz.

Hudson agreed to and did carry liability insurance on the bus. After an accident caused by the negligence of Snyder, Martz' carrier settled, before judgment, claims presented against Martz by third parties. Hudson and Snyder did not know of or participate in the settlements.

Martz then sued Hudson and Snyder to recover for the amount of the settlement. The suit was on two counts: first, the count against Hudson alone for breach of contract by Hudson of its agreement to provide liability insurance on the vehicle; second, a count against Snyder alone for negligence which was the proximate cause of Martz' having to make payments in order to settle claims against him.

The court held that since Martz was properly held responsible by the injured parties for Snyder's negligence, Martz could in turn recover over against Snyder, whose negligence caused the accident in the first place. But the court denied recovery to Martz on its first count against Hudson, holding that the plaintiff had failed to prove a breach of a specific agreement by Hudson to carry liability insurance. The court felt that it had been established that Hudson had in fact carried such insurance on the bus. This holding clearly does not amount to any declaration that Martz and not Hudson was primarily liable. True, the court discusses at some length Martz' liability as a common carrier, but this is only in order to demonstrate that Martz was properly held to be responsible by the injured third parties for Snyder's negligence.

The real basis of the denial of recovery over appears to be faulty pleading on the part of Martz. Snyder was the only defendant named in the second count upon which recovery over was granted. As between Hudson and Martz, Snyder was in fact an employee of Hudson, and it would appear that had Martz named Hudson in the second count, Martz could have held Hudson responsible for Snyder's negligence.

In *Jocie Motor Lines v. Johnson* (1950) 231 N.C. 367, 57 S.E. 2nd 388, a sequel to *Hodges v. Johnson*, discussed in Parts I and II, we see the importance of seeking recovery over in the action in which initial judgment against the certificate holder is obtained, rather than waiting until a subsequent action. In *Hodges v. Johnson*, Jocie and Johnson were held to be jointly and severally liable for Hodges damages. In this latter case, Jocie sought recovery over against Johnson. The court held that under Federal Rules 13 and 14, governing third party practice, counterclaims, and cross claims, the subject of the action, recovery over, could only have been properly dealt with in the original action of *Hodges v. Johnson*. The court stated:

> "Under the express provisions of these Rules, it was contemplated that all questions which might arise between the defendant and third party defendant, by way of contribution, indemnity, or otherwise, growing out of a pending action, should be adjudicated in one action."

The court concluded that the holding in *Hodges v. Johnson* was, "tantamount to holding them to be joint tort feasors as a matter of law, and no appeal having been taken therefrom . . . . the plaintiff is not entitled to relitigate matters which were or might have been adjudicated in that action."

The court then refers to the Widenhouse case, supra, as an example of the proper, timely raising of the issue of recovery over. The Widenhouse case was relied upon heavily by the Iowa Supreme Court in *Roxmajzl v. Northland Greyhound Lines*, 1951, 242 Iowa 1135, 49 N.W. 2d 501, which held the lessor of a passenger bus (lessor also supplying the driver) primarily liable as between lessor and lessee. However, the case turns on the borrowed servant doctrine rather than the effect of any franchise or governmental regulation.

Police Investigations and Reports as Privileged Communications

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CASES involving this question have been before the courts of several states, and they are not in complete accord as to the extent of the privilege. Apparently all agree that the report itself is not admissible in evidence where the statutes so provide. To what extent matters incorporated in that report are admissible seems to be the question.

CALIFORNIA—The law in California is set out in the recent case of *Carroll vs. Beavers,* Cal. 1954, 273 P2d 56, previous opinion 270 P2d 23, wherein the court stated,

> "The document was marked for identification, was not placed in evidence, nor transmitted to this Court on appeal, but from the record we feel justified in assuming that the document itself was the report required by said Section 484 of the Vehicle Code, and that it had been filed as such and so had gone into the confidential files of the Department of Motor Vehicles. Upon that assumption the ruling of the court prohibiting the use of the report for the purpose intended was correct. Reports required by the Vehicle Code to be made by drivers involved in accidents resulting in injuries to or death of any person are by the express wording of the statutes privileged communications. Section 488 provides that such required reports and any required supplemental report 'shall be without prejudice to the individual so reporting and shall be for the confidential use of the department' with certain exceptions not material here. This is to say, that no prejudicial use shall be made of such reports and they shall be received and kept in confidence. To make this privilege specifically applicable to court proceedings arising out of reported accidents, the section further provides that they shall not be used as evidence in any trial, civil or criminal, so arising, again with certain exceptions not here material. How this document left the confidential files of the department and arrived in the courtroom in the possession of counsel for the appellant is not made clear by the record, but however it so arrived, its release was a betrayal of the confidence which the State required its maker to repose in the State's agencies. Had this confidence not been abused, the report would not have been in the courtroom and it would not have been available for the attempted improper use of it. But even though it was a privileged communication, made so by express statutory declaration to that effect, yet the privilege is not to be extended beyond the limits set by the legislature. The law does not require that the driver involved in an accident causing injury or death shall discuss the facts thereof with anyone, and this includes patrol officers, even though they are charged with the duty of investigation. The law does require such a driver to make or cause to be made a written report of such accident to the patrol, or if the accident occurs within a city then to the police department thereof. It is this written report so made to which the privilege extends and it extends no further. If therefore, a driver elects to be interviewed by an investigating patrolman and to use the patrolman's good offices in getting up a written report for the patrol, those things which he states to the officer are not within the privilege any more than they would be privileged if made to anyone else. The court properly sustained objections to the attempted wrongful use of the report itself. * * * Nevertheless those things said in the interview with the officer, including those things which thereafter found their way into the report, were not privileged. The privilege is limited to the report itself."

However in *Kelliher vs. Ray,* 1941, 110 P2d 712, 43 Cal. Appellate 252 where a patrolman was refreshing his memory from a memoranda as he testified, the court, relying upon a prior case, held that it was error on the part of the lower court to refuse opposing counsel the right to examine such memoranda.

In *Dwelly vs. McReynolds,* et al, 1936, 56 P2d 1232, 6 California 2nd 128 the court held that the party seeking to suppress evidence such as this has the burden

to show that it is within the express terms of the statute and therefore privileged, and held that where an officer took a statement from a party which was not upon the statutory form nor for the purpose of filing as required by statute such statement is not privileged.

Other California cases: *Carpenter vs. Gibson,* 1947, 181 P2d 953, *Inouye vs. McCall,* 1940 96 P2d 386, 35 California Appellate 634.

FLORIDA—Florida seems to hold that both the written report, and oral statements which form the foundation thereof, are privileged within the meaning of the statute. The law is set forth in the case of *Stevens vs. Duke,* Fla. 1949, 42 S2d 361, wherein the court stated,

"Whether the statement furnished by Randall to Purtle was ever incorporated in the report made by Randall, is not shown by the record.

"When this case came on for trial in the court below the defendants called Randall as a witness for the purpose of having him testify to the substance of the statement made to him by plaintiffs' driver. The plaintiffs objected to this testimony on the ground that the statements made by plaintiffs' driver to the highway patrolman with respect to the accident were privileged and could not be used in any trial arising out of the accident. The objection was sustained and the defendants have assigned this ruling as error.

"It is our view that the trial court did not commit reversible error in excluding the proffered testimony. Section 317.13, Florida Statutes, 1941, F.S.A. requires the driver of a motor vehicle involved in an accident resulting in injury to, or death of, any person or total property damage to an extent of fifty dollars or more, within twenty-four hours after such accident, to forward a written report of such accident to the Florida Department of Public Safety. A failure on the part of a driver to make and forward such a report is declared by statute to be a misdemeanor. See Sec. 317.04 (2). Florida Statutes, 1941, F.S.A. Section 317.13 also requires every law enforcement officer who in the regular course of his duty investigates such a motor vehicle accident, whether at the time of and at the scene of the accident or thereafter by interviewing participants or witnesses, to forward a written report of such accident to the Department, within twenty-four hours after completing such investigation.

"By reason of the requirements of Section 317.13, the driver of plaintiffs' motor vehicle was charged with the duty of making a written report of the accident to the Department of Public Safety. We think he discharged that duty when in answer to questions propounded to him by Randall, a Florida Highway Patrolman then acting in the line of duty as a representative of the Department, he gave the patrolman a full account of his version of the accident which was reduced to writing and signed by him. The oral statements made by him were as much a part of the report of the accident as was the written statement prepared by Randall from the oral statements and signed by the driver to be forwarded to Purtle. Section 317.17, Florida Statutes, 1941, F.S.A. provides that 'All *accident reports* made by persons involved in accidents shall be without prejudice to the individual so reporting' and that 'No such report shall be used as evidence in any trial * * * arising out of an accident.' When the circumstances under which the signed statement was procured are considered, we think that it would have constituted a violation of the statute to have held that though the written statement signed by the driver was privileged, the oral statements shown by the evidence to have formed the basis for the written statement did not enjoy such immunity."

GEORGIA—While the exact position of this Supreme Court is not quite clear in *Scott vs. Torrance,* 1943, 25 SE2d 120, 69 Georgia Appellate 309, the Court stated,

"Ground seven complains of the admission of a statement of a state trooper concerning a report of the accident he had made to the state highway department. Presumably the report contained matter relating to the condition of a shoulder of the road. The witness statement should have been excluded. Testimony of the trooper as to the condition of the shoulder at the time of the accident would have been admissible, but any information from him as to a report he had made was inadmissible."

IOWA—In *Ehrhardt vs. Ruan Transport Corp.*, 1953, 61 NW2d 696, the Supreme Court held that the lower court had properly excluded testimony of a witness who had overheard questions propounded by a highway patrolman, and plaintiff's answers thereto under their statute which read as follows,

> " 'All accident reports shall be in writing and the written report shall be without prejudice to the individual so reporting and shall be for the confidential use of the department, except that upon the request of any person involved in an accident, or the attorney for such person, the department shall disclose the identity of the person involved in the accident and his address. A written report filed with the department shall not be admissible in or used in evidence in any civil case arising out of the facts on which the report is based.' "

and the Court stating,

> "We have previously discussed the intent and purpose of former similar statutes and, though the wording has been changed slightly, their purpose and objects have not been materially altered. We have come to the conclusion that such statutes were enacted to enable the state authorities to obtain unbiased, honest and correct information from persons involved in accidents on our highways. Such information is deemed necessary to the Public Safety Department of the State, and is for the purpose of compiling statistics and facts to be used in highway safety programs for the public benefit. It is most important that it be accurate. It becomes evident that to obtain such information the source must be carefully guarded so that no prejudice will result to the informant, in either a criminal or civil action that may follow, due to his honest revelations and impressions expressed. *McBride v. Stewart*, 227 Iowa 1273, 290 N. W. 700; *Vandell v. Roewe*, 232 Iowa 896, 6 N.W.2d 295; *Bachelder v. Woodside*, 233 Iowa 967, 9 N.W.2d 464. It is true the wording of the statutes involved in those cases was different, and perhaps too much importance has been given to the exact words used therein. But without again reviewing the history of this legislation we hold the intention and meaning remains the same, viz., a privilege and protection to the informant. In many ways the present statute was made stronger. The requirement is that all reports shall be in writing, and the written report shall be without prejudice to the individual so reporting. In other words, all reports shall be without prejudice to the informant and, with only the exception of the person involved and his address to ones involved or their attorneys, the report is for the confidential use of the Department of State. Information given an officer for the purpose of making his written report is a report and the report referred to in the statute. When such information is given in response to questions of an officer, the informant is clothed with the protecting warrant by the state that the information cannot be used to his prejudice in any civil or criminal suit through testimony of the officer, an eavesdropper, bystander, or anyone else. The written report furthermore is not admissible in any suit. We further hold that this is not a privilege that may be waived by an informant, for its nature is not personal alone but also public. It is not a privilege similar to the privilege found in the doctor-patient, lawyer-client, clergy-layman relationship. The interest of the state in securing correct, truthful and accurate data for its use in administrative activities pertaining to safety on the highways, justifies the subordinating of the interests of private litigants, and this paramount interest of the state should not be weakened by being subject to waiver by an individual."

In *Vandell vs. Roewe*, et al, 1942, 6 NW2d 295, 232 Iowa 896 the court held that the lower court had properly sustained objections to questions asked a highway patrolman pertaining to statements made by the defendant to the patrolman while he was investigating the accident in his official capacity, on the ground that such statements were confidential and privileged under the statute.

In *Bachelder vs. Woodside*, 1943, 9 N.W. 2d 464, 233 Iowa 966 the court was concerned with the same statute as that in the Ehrhardt case supra, and the court there stated,

> "Our consideration of the present and prior statutes causes us to reach the conclusion that the testimony of an investi-

gating official should not be held to be entirely inadmissible because he obtains a written statement which is, in itself, admissible. The evidence which the legislature was apparently seeking to make confidential was the written report which the person involved in an accident was required to make. However, a person who makes such a report to an officer particularly when the officer writes it down and it is then signed by the motorist, necessarily has to first relate it orally. The statements made to the officer by the reporting motorist which become a part of the written report should be considered as confidential as the written report itself. This, however, does not prevent the officer from testifying as to his observations made at the scene of the accident and other information obtained at other times."

It has also been held in *McBride vs. Stewart,* 1940, 290 NW 700, 227 Iowa 1273, that the testimony of a witness who overheard the interrogation of a party by an officer is subject to the same tests for privilege and exclusion as would be the testimony of the officer interrogating.

See also *Sprague vs. Brodus,* Iowa 1953, 60 NW2d 850.

ILLINOIS—In the case of *Ritter vs. Neiman,* 1946, 67 NE2d 417, 329 Illinois Appellate 163, the court stated,

"The appellee argues here that the trial court erred in permitting the sheriff to testify to the admission that the defendant made at the scene of the accident that he failed to stop before entering the highway in question. To support this contention he cites Section 141, Chapter 95½, Illinois Revised Statutes, which reads as follows, 'All required accident reports and supplemental reports shall be without prejudice to the individual so reporting and shall be for the confidential use of the department except that the department may disclose the identity of a person involved in an accident when such identity is not otherwise known or when such person denies his presence at such accident. No such report shall be used as evidence in any trial, civil or criminal, arising out of an accident, except that the department shall furnish upon demand of any person who has, or claims to have made such a report, or upon demand of any court, a certificate showing that a specific accident report has or has not been made to the department solely to prove a compliance or a failure to comply with the requirement that such a report be made to the department'. Here there was no such report offered in evidence. The statute specifically enjoins the use of the report in a civil or criminal trial. For this court to hold that a party making such report could not testify to 'admission against interest' made by a party to an accident, would extend the language of the statute to include prohibition not contained therein. If on this trial appellant had sought to introduce in evidence the sheriff's report, it would have been inadmissible under the statute. We do not believe the trial judge erred in this ruling."

The only other Illinois case on this subject is *Gidlof vs. Grosser,* 1948, 80 NE2d 283, 335 Illinois Appellate 124, affirming a municipal court verdict without opinion.

MICHIGAN—In *Wallace vs. Skrzycki,* 1953, 61 NW2d 106, 338 Michigan 165, the court stated,

"An examination of our previous holdings discloses, then, that except for the language in Jakubiec, which I deem inadvertent and decline to follow although in accord with this decision, we have adhered to the position that the statute in question does not bar a police officer from testifying concerning physical facts observed by him or admissions made to him by drivers of vehicles at the scene of an accident and that police reports of accidents are not barred by the statute for use as evidence or refreshing a witness's recollection."

And in *Heiman vs. Kolle,* 1947, 27 NW2d 92, 317 Michigan 548 the court stated,

"There was no attempt to introduce his report in evidence. His testimony as to what the defendant told him does not contravene the purpose of the above act. In *Delfosse vs. Brsnahan,* 305 Michigan 621, 9 NW2d 866, defendant made a report of an accident to the chief of police. We there held that it was proper for the chief of police to testify as to

measurements of distances he made on the street at the place where the accident occurred; and that there were red spots, evidently blood, near the place where the accident occurred. It was not the purpose of the act to keep admissions made by defendant from the ears of the court or jury."

The Michigan act is set forth in the Heiman case, and is distinguishable from some others.

See also *Carlson vs. Brunette,* et al, 1954, 63 NW2d 428, 339 Michigan 188.

MINNESOTA—By recent amendment to statute, there is no privilege as to the matter contained in the reports, the statute stating,

"Nothing herein shall be construed to prevent any person who has made a report pursuant to this chapter from testifying in any trial, civil or criminal, arising out of an accident, as to facts within his knowledge. It is intended by this subdivision to render privileged the reports required but it is not intended to prohibit proof of the facts to which such reports relate. * * *".

Rockwood vs. Pierce, Minn. 1952, 51 NW 2d 670. To like effect *Garey vs. Michelson,* 1949, 35 NW2d 750, 227 Minnesota 468.

The Minnesota statute apparently was amended in 1947 to permit such testimony, and in that regard see *Beckman vs. Schroeder,* Minn. 1947, 28 NW2d 629.

However, prior to the amendment the rule was different, in that respect see *Hickok vs. Margolis,* 1946, 22 NW2d 850, 221 Minnesota 480.

TEXAS—The Texas Supreme Court seems to have gone quite a "far piece" to allow admission of accident reports prepared and filed by investigating officers, especially where they might be relevant for the purposes of impeachment of the officer.

In *Haddad vs. Brown & Root, Inc.,* et al, 1943, 175 SW2d 269,.....Civil Appeals .....,, a pedestrian death case, a patrolman testified that the vehicle involved had a dusty or muddy windshield, and on cross examination said that he had so stated in his report to the State Highway Department, and apparently defendant communicated with the State Highway Department and obtained a copy of that report or had it sent to the patrolman and managed to get it before the court. The report showed the patrolman stating that the driver was blinded by glaring lights and did not mention the muddy windshield. The trial court permitted the introduction of the report in evidence apparently on the grounds of impeachment. The Court of Civil Appeals quotes the pertinent parts of the statute saying,

"The Department of Public Safety of this State is vested by statute with the power and duty of enforcing 'the laws protecting the public safety and providing for the prevention and detection of crime.' Art. 4413(1), Vernon's Civ. Stats. The personnel of the Texas Highway Patrol are under the jurisdiction of that Department. Art. 4313(12). For the obvious purpose of enabling the department to more intelligently perform its duties of protecting the public safety, and gathering and procuring statistics relating to the number, cause and effect of traffic accidents on the public highways of the State, the following sections were embraced in Art. 6687b, constituting 'Article V—Accident Reports',

" 'Sec. 39. Accidents to be reported by persons involved.

" 'Every person involved in an accident resulting in death, injury, or apparent property damage * * * shall make a report of such accident to the Department of Public Safety within forty-eight (48) hours. * * * Reports required by this Section shall be deemed privileged communications.

" 'Sec. 40. Accident statistics and reports.

" 'The Department shall prepare and shall supply to police and sheriffs' offices and other suitable agencies, forms for accident reports, and such reports shall be made within a reasonable time from the date of such accident by such officers or agencies to the Department at Austin, Texas, sufficiently detailing all the facts with reference to any highway accident, and the persons and vehicles involved.

" 'Sec. 41. Report of deaths resulting from accidents.

" 'Every coroner, justice of the peace, or other official performing like functions shall on or before the tenth (10th) day of each month report in writing to

the Department the death of any person within his jurisdiction during the preceding calendar month as the result of any accident in which a motor vehicle was involved and the circumstances of such accident.

" 'Sec. 42. Accident reports confidential.

" 'All required accident reports and supplemental reports shall be without prejudice to the individual so reporting and shall be for the confidential use of the Department except that the Department may disclose the identity of a person involved in an accident when such identity is not otherwise known or when such person denies his presence at such accident. No such report shall be used as evidence in any trial, civil or criminal, arising out of such accident, except that the Department shall furnish upon request of any person who has, or claims to have, made such a report or upon demand of any court, a certificate showing that a specified report has or has not been received by the Department, solely to prove a compliance or failure to comply with the requirement that such report be made to the Department.' "

The Court goes on to state,

"Obviously the report by Patrolman Roensch was made in pursuance of Sec. 42, supra, which provides that such reports shall be for the confidential use of the Department of Public Safety and plainly and mandatorily prohibits the use of such reports 'as evidence in any trial, civil or criminal, arising out of such (traffic) accident, * * *.' The reason for this prohibition is not far to seek. The object of requiring the Department to furnish forms for such reports and the officers to make reports thereon is to enable the Department to procure and preserve facts of accidents from a presumably disinterested officer, as the latter uncovers and appraises those facts from investigations made by him upon the ground and gathered from witnesses, both interested and disinterested, interviewed by him. Obviously this information is designed to aid the Department in assembling data and statistics relating particularly to accidents upon the highways, with the ultimate object of reducing and preventing recurring accidents. To accomplish these objects, without prejudicing the rights of parties involved in accidents, or to the officers reporting thereon, it is essential that such reports be kept inviolate by the Department for its exclusive use. This is in keeping with the clear intention and spirit of the statute, and in accord with the executive construction thereof, as indicated by the caption of the forms of those reports furnished by the Department to highway patrolmen, and used by Patrolman Roensch in this case, which reads,

" 'Confidential.

" 'Any accident report is by law a privileged communication and cannot be used as evidence in any trial, civil or criminal. The reports are used only in accident prevention work.'

"It goes without saying that in making such report to his Department the patrolman shall have and be made to feel the utmost freedom, subject only to his own conscience and sense of duty to the very important State Department he serves. The report is required to be made, and upon its face is made, for the exclusive use of that Department. It is not made for and must not be subjected to the free use of litigants in settling their private quarrels in the courts of the State, as was done with possible, if not probable, deadly effect upon plaintiffs by the defendant in this case. If such use was permissible then in every case of this nature either party could manipulate the production and introduction in evidence of such confidential report through a studied device of impeachment. Such indiscriminate use of such reports would seriously hamper officers in making conscientious reports of accidents, and thereby defeat the wise purpose of the law to elicit such facts as would further the object of procuring unbiased and disinterested information designed to aid the Department in preventing other accidents of like nature. In this case the Department, or some person in its office, improvidently released the copy of Roensch's report, and the trial judge should not have requested, if not ordered, Roensch to release it for evidence, over the latter's objection that a 'law passed by the last legislature forbids us to give that accident report to anyone,' and over plaintiffs' vigorous and consistently urged objections, which,

though sometimes vague, can and should be construed to include the appropriate objection that its introduction was contrary to the law and public policy. In our opinion the trial judge erred in admitting the accident report, which was highly damaging and prejudicial to plaintiffs, and the error was therefore material and reversible."

Haddad vs. Brown & Root was taken to the Supreme Court on writ of error which was first denied and then granted, and the Court quoted from a prior unpublished opinion in 180 SW2d 839, 142 Texas 624, and reversed the Court of Civil Appeals, stating,

" 'Section 39 requires reports of accidents by "every person involved," that is, by every party to the accident, and provides that such reports "shall be deemed privileged communications." Roensch's report was called for by Section 40 as the findings of an officer investigating the accident, and it says nothing about any such report being privileged. Clearly, then, the purpose of Section 42 is to qualify the blanket privilege extending to reports made by "persons involved" by Section 39, in two particulars, namely (1) permit the Department of Public Safety to disclose the identity of any person involved in any accident, when such is not known or when such person denies his presence at the accident; and (2) to permit the Department of Public Safety to certify that such report was made, to prove that any person claiming to have made the report has or has not made it. Obviously, Roensch's report, as such, is a hearsay statement and should be excluded at another trial, if objected to on that ground, except such parts thereof only as may tend to impeach any direct evidence given by Roensch.' • • • The predicate was thus laid for impeaching the witness, and under our memorandum opinion above copies, which we here re-affirm, that portion of the report was admissible in evidence for that purpose."

Also see *Airline Motor Coaches, Inc. vs. Howell,* et al, Tex. 1946, 195 SW2d 713 wherein the court held that a written statement given by the driver of a vehicle to a deputy sheriff was admissible, over objection based upon the Texas statutes, for the purposes of impeaching testimony of such party at trial. The case does not clearly point out whether the objection was on the basis of being privileged under Section 39 or whether it was to be excluded on the basis of Section 42 of the statute involved (set forth in the first opinion on *Haddad vs. Brown and Root*). The court stated that after appellant had objected to the introduction of part of the statement appellant went ahead and introduced the entire statement in evidence.

Note: We have no South Dakota cases construing the statute in question, but the Supreme Court has stated in *Peterson vs. Peterson,* 17 NW2d 920, 70 SD 385, as regards a copy of an income tax report, that,

"In the absence of statute, a communication in respect to private matters is not privileged by reason of the fact that it is made to a public official."

See key number 216 under Witnesses, American Digest System.

Workmen's Compensation—Rights of Dependent Illegitimate Children

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WORKMEN'S Compensation laws long have been considered as typical illustrations of legislative recognition of social consciousness. It may therefore be assumed that in the application of these special laws, the courts would tend to reflect the social attitudes of the people of the area represented. This, in some instances at least, would be expected to carry over into the express approval or disapproval of various relationships and conduct.

As a general proposition, the foregoing statement is probably a safe generalization. Courts have refused to award benefits for self-inflicted injury or for injury arising out of wilful intoxication. Conversely, in at least one instance recovery has been permitted where the injured employee, technically acting beyond the scope of his employment (as a peace officer), was engaged in the "humanitarian" act of giving aid to highway accident victims. *Butler v. Industrial Comm.*, 265 Wis. 380, 61 N.W. 2d 490 (1953).

Similar concepts of right and morality have been applied in numerous instances where questions arose as to the dependency status of certain survivors of the decedent. In Wisconsin where the so-called common law marriage is not recognized, the court has denied benefits to the alleged common law widow. *T. J. Moss Tie Co. v. Industrial Comm.*, 251 Wis. 57, 27 N.W. 2d 725 (1947); *Armstrong v. Industrial Commission*, 161 Wis. 530, 154 N.W. 844. In the same circumstances the court has held that the mistress' children—not those of the decedent—were not entitled to the death benefits, even though the children were in a sense members of the household and were, in fact, dependent upon the decedent employee. Such was the holding in the *T. J. Moss* case, supra.

The latter position apparently meets with disapproval in some jurisdictions. *Moore Shipbuilding Corp. v. Ind. Acc. Comm.*, 185 Cal. 200, 196 P. 257; *Campton v. Industrial Commission*, 151 P. 2d 189, 106 Utah 571. It is impliedly criticized in Larson's *The Law of Workmen's Compensation* (1952), section 62.23 and Footnote No. 19.

The closer question in most jurisdictions seems to arise as to the status of children resulting from the illicit relationship. There is a notable lack of unanimity among the courts, even when allowances are made for statutory differences. As a general proposition, little stress seems to have been laid upon the actual fact of dependency nor does the fact itself offer the solution to the problem. Most statutes create a presumption, often conclusive, of dependency as to "children of the decedent" living with him at the time of his death. In many instances, dependents are limited to certain classes of relationship to the decedent which, however, will always include children.

The solution of the problem has been found by some courts in the simple application of the universal common law rule that words such as "child", "children" and "issue", unless expressly limited by the statutory language or limited because of necessarily inferred intent, include within their meaning only legitimates. *Will of Scholl*, 100 Wis. 650, 659, 76 N. W. 616. This was the exact position of the Wyoming court in *Lopo v. Union Pacific Coal Co.*, 79 P. 2d 465. This case denied benefits to five alien illegitimates, the Wyoming court saying with reference to the definition of the word "child" or "children" in the Wyoming Statute:

> "We cannot agree that the meaning of the word 'child' in Sec. (k) *supra*, is enlarged by the words 'immediate offspring' that follow. The ordinary meaning of . . . *'off-spring' is issue* or *lineal descendants* of any degree . . . The cases, texts and law dictionaries are practically unanimous in declaring that *prima facie* the word 'child' in a statute means legitimate children". (Emphasis supplied)

See the same effect generally in *Green v. Kelley*, 118 N. E. 235, 237 (Mass.); *Murrell v. Industrial Commission*, 291 Ill. 334, 126 N.E. 189; *Scott v. Independent Ice Co.*, 135 Md. 343, 109 Atl. 117; *Bell v. Terry & T. Co.*, 177 App. Div. 123, 163 N.Y.S. 733

(the New York Act has since been amended); *Staken v. Industrial Commission,* 127 Ohio St. 113, 186 N.E. 616, affirming 187 N.E. 315; *Hargrove v. Lloyds Casualty Co.,* 66 S.W. 2d 466 (Tex. Civil App. 1933) and the very excellent dissenting opinion in *Green vs. Burch,* 189 P2d 892, 164 Kans. 348.

In a number of other instances, dependency benefits have been granted, in part at least on the basis that the sins of the father should not be visited upon the children. See Larson's *The Law of Workmen's Compensation; Piccinim v. Connecticut Light & Power Co.,* 93 Conn. 423, 106 A. 330. In that case the Connecticut court compared the position of the children with that of the mother and said:

> "* * * The children's position in that household was a very different one. They were not only innocent of their parents' wrongdoing, but their father, in caring for them, was acting in obedience to the mandate of the law. It was alike his moral and legal duty to maintain them, and it was quite within his legal right to do so in the most natural and convenient way by taking them into his household. That he kept his unlawful consort there also is a matter for which they were not repsonsible. They certainly should not be punished for his unlawful act in so doing or hers in remaining."

In 1917 the Wisconsin court in the case of *Kuetbach v. Industrial Commission,* 166 Wis. 378, 165 N.W. 302 denied benefits under the following facts: The employee received injuries which did not result in his death for some time. At the time of injury, he was living in an illicit relationship with a woman who later filed application as his widow. At the time of injury she was carrying his child. Subsequently, this man and woman were married. Shortly thereafter, he died and still later the child was born. Having been born in lawful wedlock, the child was legitimate under the Wisconsin law. The Wisconsin court ruled that since the status of dependency must be determined as of the date of injury, neither the alleged widow nor the child was entitled to benefits. The Wisconsin court commented that the status of the child as a legitimate dependent was not established on the date the injury occurred.

As of the present time, this ruling has never been overruled. At first blush it would appear to place Wisconsin on the side of those refusing benefits to illegitimate children. Yet, the contrary result has been recently achieved without the slightest intimation that the *T. J. Moss* case was in any way overturned.

In *Waunakee Canning Corporation v. Industrial Commission,* 268 Wis. 518, decided January 11, 1955, decedent had lived with his so-called common law wife in Mexico for a number of years. She had borne him two children, one of whom was living at the time of his fatal injury. There appears to have been little question but that the child was actually supported by her father. The Commission, consistent with the *T. J. Moss* case, had denied benefits to the alleged widow (there being at least no proof that common law marriages are recognized in Mexico and the inference being only that there was a recognition of the distinct status of the concubine), but awarded benefits to the child. The Wisconsin court affirmed this determination citing with approval the *Piccinim* case, *supra.*

It is not completely clear from the text of the opinion whether the court predicates its holding basically on the position of the child in the decedent's household or upon the actual relationship between them and the decedent's obligation under law to support the child. It is felt that the ruling is broad enough to sustain subsequent awards of benefits to illegitimate children who in other respects meet the statutory dependency tests.

In some instances, courts have apparently felt that the legitimate or illegitimate status of the child was not to be considered controlling because of the statutory inclusion within the dependency class of "members of the decedent's household" who were actually living with him at the time of his death. *Bassier v. Connely Construction Co.,* 198 N. W. 989. (Mich.) This may indeed be a logical and valid distinction; yet, it would not seem to be the Wisconsin test. Otherwise, the decision in the *T. J. Moss* case should have been overruled in the most recent Wisconsin decision. The court did not intimate that the two holdings are in any sense inconsistent.

We have made no attempt herein to indicate the rule in all jurisdictions nor to gather even a majority of the cases supported. For those interested, further reference may be made to the annotations on de-

pendency within the Workmen's Compensation Act; 13 A. L. R. 686, 704; 35 A. L. R. 1066, 1073; 39 A. L. R. 313, 319; 86 A. L. R. 865, 877; 100 A. L. R. 1090, 1098.

As stated earlier in this paper, each particular statute should be analyzed carefully before reaching a conclusion as to the result in your particular state. Occasionally, definitions will be found in the statutes which are themselves decisive. In others there will be found a correlation between the statutory section in question and other provisions of the general compensation laws. In many other instances, the ultimate decision, as in the *Waunakee Canning Corporation* case, will rest upon the court's own social conscience and its willingness to depart from established definitions of the legal terms used in the statute in interpreting legislation of the type which has been characterized as remedial. The writer's suspicion is that an increasing number of courts will reach the same decision as the Wisconsin court.

A Breach in the Dam of Constitutional Protection

Watson v. Employers Liability Assurance Corporation, Ltd.

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IF your company issues a policy of insurance containing coverage limitations, valid where issued, and prohibiting direct action against your company until the liability of your insured has been finally determined, can you rely upon these policy provisions when the insurance is sought to be applied in other states?

Yes, you say, the contract is a valid contract not against public policy or morals and is entitled to constitutional protection wherever applied. But don't be too hasty about this conclusion.

> "Where, as here, a contract affects the people of several states, each may have interests that leave it free to enforce its own contract policies. * * * Louisiana has a constitutional right to subject foreign liability insurance companies to direct action provisions of its laws *whether they consent or not.*" (Emphasis supplied) Justice Black in *Watson v. Employers Liability Assurance Corporation, Ltd.*, 75 Supreme Court 166, 99 L. Ed. 90.

With these words the United States Supreme Court on December 6, 1954 took a seven-league step towards reading into every insurance contract both substantive and procedural rules applicable in each state in which the coverage of the policy was sought to be made available—whether contrary to express policy provisions or "whether by consent or not."

The ruling came in a test of the application of the Louisiana "direct action" statute which, by its terms, permits direct suit against liability insurers whether the policies involved are issued within or without the state. In this instance the policy was, in fact, issued in New York and contained the standard "no action" clause which generally has been recognized as valid in that state. The company had, as a condition to becoming licensed to do business in Louisiana, filed a written consent to be sued directly as provided in the Louisiana direct action statute.

It would seem rather apparent that under these circumstances the Supreme Court could well have achieved the same result, that is, of permitting the direct action against the insurer, without determining the "serious question affecting the constitutional relationships of the states" involved in permitting Louisiana, in effect, to rewrite the New York contract. Such indeed is the tenor of the well-considered concurring opinion of Mr. Justice Frankfurter.

Such indeed also seems to be the basis of a line of decisions modifying policies issued in one state in such manner as to make their terms fully consistent with the requirements for policy provisions in other states wherein they have been certified under financial responsibility acts. For example, *Hartford Accident & Indemnity Co. v. Wolbarst*, 57 A. 2d 151 (N.H. 1948); *Farmers Ins. Exchange v. Ledesma*, 214 F. 2d 495 (C.A. 10 1954) and *Petrowski v.*

Hawkeye Insurance Co. (unreported), Civil No. 2498 U.S.D.C.W.D., Wisconsin (the writer understands that the latter case is pending appeal in the Seventh Court of Appeals.)

Stated briefly, it appears to be the position of the majority of the Court in the *Watson* case that the constitutional protections of due process and the inviolability of contractual rights is subordinate and must, therefore, give way to the greater interest of each individual state in protecting in the manner deemed most appropriate by it the individual welfare of citizens of such states.

It is not our intention at this time to engage in a discussion of the merits of the position of the majority as contrasted with that of the minority speaking through Mr. Justice Frankfurter. The eminent jurists who wrote the respective opinions are no doubt more appropriately referred to for that purpose. It is felt that the decision is, however, of sufficient significance to justify a suggestion of its impact upon the law of insurance.

In the limited group of states having any type of direct action statute, questions will naturally arise because of earlier interpretations of the statute limiting its application to contracts made within the state, *Ritterbusch v. Sexmith,* 256 Wis. 507; 41 N.W. 2d 611, or where particular policy provisions themselves affected the incorporation of the local rule. *Sheehan v. Lewis,* 218 Wis. 588; 260 N.W. 633. The position may well be advanced that these cases simply construe the statute as being limited in their application and not as decisions upon the constitutional issues. It is, of course, apparent that such construction has been influenced by the constitutional questions. At least one of the state trial courts in Wisconsin has been reported to have held the no action clause ineffective under the *Watson* case, even in the absence of policy provision waivers.

In a greater number of states questions will arise as to the continuing force of policy limitations or exclusionary clauses recognized as valid in the states in which the policies have been issued. For instance, in Illinois coverage may be denied by the terms of the policy for injuries received by members of the insured's household, including his wife and children. Such a clause is not permitted in policies issued in the State of Wisconsin. Section 204.34 (2) Wis. Stats. 1953.

Some states may permit the refusal of coverage to any operator using the vehicle for an unlawful purpose or who is under the age authorized by law to use an automobile. Again such a clause is not permitted in other states, including Wisconsin. Sections 204.34 (1) (a) and 204.34 (1) (b) Wis. Stats.

The scope of the so-called "omnibus insured" coverage is not uniform from state to state. It is understood some recognize the limitation of this coverage so as to exclude injuries to co-employees of the same employer. However, in Wisconsin at least the avoidance of coverage to a person so situated is not permitted under the omnibus clause, although it may be accomplished by a special and limited exclusion. *Shanahan v. Midland Coach Lines,* 268 Wis. 233, 67 N.W. 2d 297; *Schneider v. Depies,* 265 Wis. 293, 62 N.W. 2d 431.

Many more examples may suggest themselves. They will, of course, and of necessity vary from state to state. No attempt is here made even to intimate all of the potentially encountered differences. The suggestion is made that in conformity with the *Watson* decision the rules of construction and policy coverage, whether applicable because of common law or statute, may now depend wholly upon the law of place of injury. The insurance "contract" is no longer such in the strict sense because subject to innumerable variations. It may at one time or another incorporate the varying rules of all forty-eight states and the District of Columbia.

An Insurance Lawyer Looks at the Proposed Canon

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Syracuse, New York

THE American Bar Association Special Committee on Investigation, Solicitation and Handling of Personal Injury Claims of which Paul W. Updegraff of Norman, Oklahoma, is Chairman, and Clifford W. Gardner of St. Paul, Minnesota, Leon J. Obermayer of Philadelphia, Pennsylvania, Lawrence L. Connor of Chicago, Illinois, and John J. Yowell of Chicago, Illinois are members, is considering a recommendation to the House of Delegates of the adoption of the following Canon:

"When any member of the bar shall investigate or adjust any claim for any insurance company or agency either directly or indirectly, through the service of any other person, neither shall said member, nor any partnership of attorneys by whom he is employed, be permitted to represent for compensation as attorney, for any personal injuries sustained, any person, firm or corporation in any wise identified with said claim as a result of the facts and circumstances through which said claim originated, except the insurance company or agency for which or for whom the said investigation or adjustment was made. Provided that this Canon shall not apply to the representation of any person charged with a criminal offense in any Court of this State."

This Canon was before the Executive Committee at the Mid-winter Meeting for discussion.

The purpose of the writer is not to record their action or discussion, but simply to pull from his own experience certain heretofore thought to be proper activities of an ethical lawyer apparently now to be frowned upon if this Canon is adopted.

The statement of the Committe accompanying the Canon indicates that they feel and say, that one of the greatest menaces today against ethical lawyers occurs in the field of tort law in the solicitation of cases by claim adjusters on behalf of lawyers representing insurance companies.

While this premise is certainly deniable and non-existent in many places at least, the Canon itself does not hit solicitation. As a matter of fact, the American Bar Association is already well equipped with Canons affecting solicitation and properly so.

Without attempting to argue the merits pro and con, may the writer point to two actual circumstances in his own practice as an insurance lawyer that would be hereafter forbidden if the Canon were adopted.

One, a concluded case, was a case where a fellow practitioner who had long since ceased doing any trial work, came to the writer with a client who had suffered severe injuries in an automobile accident. The lawyer came not only because of friendship and respect but also motivating his action was the fact that the writer would or already had appeared for the insurance company defending a claim made against his client.

In such a case, of course, the attorney representing the carrier, if he has done his job properly, has not only had his own office force working on the preparation and investigation of the fact but has probably guided and directed the investigation and possible adjustment efforts, if they were made by the company's employees.

This particular incident, in the case in question, ended quite favorably, but would be a breach of ethics under this new Canon.

In the second incident, affecting matters now pending, a family, neighbors of the writer, were involved in an accident in front of the writer's own premises; the wife and mother of the family was killed, and one of the minor sons suffered the loss of a leg. The case came from long association of the writer with the family of the damaged, and without any reference to the fact, which was true, that the family was insured in a company for which the writer is local attorney and in which particular case he had and would have a considerable part in the investigation and the adjustment of claims, if any adjustments were made.

These are only two of a number of similar incidents which I am sure have occurred in the practice of many if not all attorneys who represent insurance carriers. Certainly, there is nothing in this practice which is unethical and nothing of the kind that should be forbidden by Canon.

Report of Metropolitan Mid-Winter Meeting of Members Of International Association of Insurance Counsel

PRICE H. TOPPING, *Chairman*
New York City, N. Y.

THE Lucky Thirteenth Annual Mid-Winter Reception and Luncheon for members of the Association and their families and friends from the Metropolitan area was held at the Biltmore Hotel in New York on January 29, 1955.

During World War II years when transportation was curtailed, Oscar Brown, Ray Caverly and Jim O'Hara started this annual get-together and it has continued to grow in popularity, enthusiasm and attendance. This year 132 members attended from a number of states. Invitations to this are sent to members resident in New York, New Jersey, Pennsylvania and Connecticut, but occasion shows that even more distant members find their way to the meeting.

The usual honored guests were not present for various reasons. President Stanley Morris and President-Elect Lester Dodd, and other members of the Executive Committee tried hard to attend but were busily engaged in business following the Mid-Winter Executive Committee Meeting of the Association and hence were unable to attend. Loyd Wright, President of the American Bar, with Mrs. Wright, had accepted an invitation to attend and got as far as Washington, D. C., where he was laid up in the hospital with a cold at the time of the meeting. Honorable Alfred J. Bohlinger, then Superintendent of Insurance of the State of New York, and Mrs. Bohlinger had also accepted but, in view of the fact that he that day tendered his resignation from that office, he sent his regrets.

In line with the nature of the meeting, there were no speeches and no business was transacted. Friendly greetings were extended by several. The gathering closed with the singing of the National Anthem by June Werner, accompanied by Ellsworth Van Graafeiland at the piano. A number continued on with some good barbershop harmonizing of old favorites with the capable help of Ellsworth at the piano.

Those who attended were:

Mr. Marcus Abramson
Mr. and Mrs. Milton L. Baier, Buffalo, N. Y.
Mr. George E. Beechwood, Philadelphia, Pa.
Mr. and Mrs. James Beha
Mr. Robert Bell
Mr. and Mrs. Fred Benson
Mr. and Mrs. Jesse Benton, Jr.
Mr. and Mrs. Morgan F. Bisselle, Utica, N. Y.
Mr. and Mrs. George Brown
Mr. and Mrs. J. Richard Burns
Mr. and Mrs. Ross Chamberlain
Mr. Joseph Craugh, Utica, New York
Mr. and Mrs. Thomas S. Croake
Mr. and Mrs. Thomas P. Curtin
Mr. Thomas Cusack
Mr. James Dempsey, White Plains, N. Y.
Mr. and Mrs. Peter Devine, Camden, N. J.
Mr. and Mrs. Herbert Dimond
Mr. Walter A. Donnelly
Mr. James B. Donovan
Mr. Walter G. Evans
Mr. Ernest Fields
Mr. and Mrs. William F. FitzPatrick, Syracuse, N. Y.
Dean John F. X. Finn
Mr. Meyer Fix, Rochester, N. Y.
Mr. and Mrs. Donald Gallagher, Albany, New York
Mr. and Mrs. John H. Galloway, Oneida, N. Y.
Mr. and Mrs. Frederick M. Garfield
Mr. John F. Gates
Mr. William F. X. Geoghan
Mr. and Mrs. Paul Gouldin, Binghamton, N. Y.
Mr. Alex Gourlay
Mr. A. H. Harpending, Elmira, N. Y.
Mr. and Mrs. Richard Hartig
Mr. and Mrs. Wilbur Hecht
Mr. and Mrs. Joseph Head, Jr., Philadelphia, Pa.
Mr. and Mrs. George Ingalls, Binghamton, N. Y.
Mr. James S. Kernan, Jr., Utica, N. Y.
Mr. and Mrs. William D. Kiley, Oneida, N. Y.
Mr. and Mrs. Donald Kramer, Binghamton, N. Y.
Mr. and Mrs. Lionel Kristeller, Newark, N. J.
Miss Evelyn Lahey

Mr. and Mrs. William F. Martin
Mr. and Mrs. William Mattison
Mr. and Mrs. Al Mayer, Philadelphia, Pa.
Mr. and Mrs. Wm. E. McCauley
Mr. and Mrs. Sidney P. McCord, Jr., Camden, N. J.
Mr. Percy McDonald, Memphis, Tenn.
Mr. and Mrs. Edward McLaughlin, Syracuse, N. Y.
Mr. Clarence E. Mellen
Mr. Alfred Morgan, Utica, N. Y.
Mr. Willis D. Morgan, Utica, New York
Mr. and Mrs. John E. Morris
Mr. William C. Morris
Mr. and Mrs. William H. Morris, Rochester, N. Y.
Mr. and Mrs. George Morrison
Mr. and Mrs. Thomas Mount, Philadelphia, Pa.
Mr. and Mrs. Joseph Murphy, Syracuse, N. Y.
Mr. Henry Nichols
Mr. and Mrs. Joseph O'Brien, Brooklyn, N. Y.
Mr. James M. O'Hara, Utica, New York
Mr. Thomas J. O'Malley
Mr. and Mrs. Alexander Orr, Jr.
Mr. and Mrs. Samuel P. Orlando, Camden, N. J.
Mrs. Michael A. Orlando, Camden, N. J.
Mr. and Mrs. James C. O'Shea, Rome, N. Y.
Miss Madeline Ossman
Miss Norma Oswald
Mr. Edward J. Pacelli
Mr. John Paper
Mr. and Mrs. Raymond J. Scully
Mr. Jerome H. Searl
Mr. Jay Shereff
Mr. William Shumate
Mr. Edward Spencer
Mr. Thomas W. Sullivan
Mrs. Robert Summersgill, Suffern, N. Y.
Mr. Alton W. Teale, Suffern, N. Y.
Mr. Deroy Thomas
Mr. and Mrs. Price Topping
Mr. James Travis
Mr. Warren C. Tucker, Utica, N. Y.
Mr. and Mrs. Ellsworth Van Graafeiland, Rochester, N. Y.
Mr. and Mrs. Richard Wagner
Mr. and Mrs. Edward W. Warren, Scranton, Pa.
Mr. Luther Ira Webster, Rochester, N. Y.
Mr. and Mrs. Victor D. Werner
Mr. George Whitehead
Mr. Melvin W. Zurrett, Rochester, N. Y.

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JULY 7, 8, 9, 1955

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July 7th, 8th, 9th
1955